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REFORMING RIGHTS:
LESBIAN AND GAY STRUGGLES FOR LEGAL EQUALITY IN CANADA

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SUMMARY

In recent years, Canadian governments and courts have increasingly responded positively to the demands of lesbian and gay communities for legal rights. As a result, in several instances, such rights have been extended, at both statutory and constitutional levels. In this thesis, I consider the politics of struggles for lesbian and gay legal equality in Canada. Although I explore several developments in this area, I focus my analysis upon two key examples: the struggle, in 1986, to add a "sexual orientation" ground to Ontario's Human Rights Code; and a key legal rights case launched in the late 1980s, and still on-going as of this writing (Mossop).

More specifically, I address three key questions: [1] how are lesbian and gay subjects and subjectivities constituted through human rights law and what forces produce these legal constructions? [2] how capable are liberal democracies of accommodating 'sexual pluralism', and what are the implications of this for other areas of social transformation? [3] what is the relationship between the lesbian and gay rights movement, its principal opponents the New Christian Right, and 'the state' - how do the struggles of social movements for interpretive authority shape the law-making process (and vice versa)?

In responding to these questions, I draw upon diverse approaches in legal theory, sociology, feminism, and lesbian and gay studies. My analysis centres upon the role of law as a site of struggle. I explore the engagements between the lesbian and gay rights movement, and its key opponent the New Christian Right. I assess the effects of lesbian and gay rights campaigns in both the short and long terms, considering issues to do with social movement mobilisation, effective political communication, and the role of these struggles in shifting dominant frameworks of meaning. I offer a detailed discussion of the role of rights, as goal and rhetoric, within political action. And I consider the relationship between law, and other forms of knowledge. I argue that the effects of legal struggle are complex, contradictory, and unpredictable. Lesbian and gay rights reforms have both entrenched and undermined dominant paradigms of sexuality, and the effects of legal struggle in this and other areas must be assessed in the long-term.

This thesis contributes to knowledge in four key areas: critical rights theory; theories of law and social change; the sociology of social movements and religions; and lesbian and gay politics. I use a combination of legal, sociological, feminist, and historical methodologies.

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ABBREVIATIONS

A.G.	Attorney-General
CFV	Coalition For Family Values
CGRO	Coalition For Gay Rights in Ontario
CHRA	Canadian Human Rights Act
CLS	Critical Legal Studies
EEOC	Equal Opportunities Commission
FFA	Focus on the Family Association
GATE	Gay Alliance Towards Equality
LEAF	Women's Legal Education and Action Fund
LP	Liberal Party
NCC	National Citizen's Coalition
NCR	New Christian Right
NDP	New Democatic Party
NOW	National Organisation of Women
MPP	Member of Provincial Parliament
PAW	People For the American Way
RTPC	Right to Privacy Committtee
RW	REAL Women of Canada
SCC	Supreme Court of Canada

CHAPTER 1

INTRODUCTION, METHODS, AND RESEARCH ETHICS

A. Introductory Comments

In the latter half of the twentieth century, lesbian and gay movements, particularly those located within western democracies, diversified and deepened their political struggles. The rise of lesbian feminism, fragmentations resulting from 'identity politics', AIDS and Queer Nation activism, and openly gay conservatives all contributed to the complex and often contradictory social analyses and strategies that exemplify modern lesbian and gay politics.¹

Lesbian and gay movements have always contained, amidst a plethora of activities, individuals and organisations committed to achieving change through law reform. In most countries, this began with demands, mainly by gay men, for the de-criminalisation of 'homosexual' (male) offences, and expanded to include other coercive practices of the state - police harassment, obscenity laws, and other similar issues. In many jurisdictions, criminal law reforms remain near the top of the agenda (eg: age of

¹ It is thus far more accurate to speak of lesbian and gay movements, than to assume any monolithic, homogenous entity.

consent in Britain; sodomy statutes in many American states).²

Perhaps somewhat later, alongside criminal law reform organisations, there emerged a law-oriented movement of a different sort - the modern lesbian and gay rights movement.³ Reflecting a shift in politics from demands to 'keep the state off our backs' (through de-criminalising same-sex sexual activity, ending prosecutions of gay publications and bookshops under obscenity laws, and so on), the rights movement demanded legal protection, primarily through inclusion within anti-discriminatory statutes and the extension of social benefits to lesbian and gay couples. Recently, lesbian and gay law reform politics has come full-circle with demands to criminalise homophobic abuse as 'hate crimes' (see Petersen, 1991).

During this period, there have been many different kinds of lesbian and gay rights law reform initiatives

² Broad studies of lesbian and gay movements are found in Adam (1987); Altman (1982); D'Emilio (1983); Faderman (1991); Kinsman (1987); Weeks (1977; 1981; 1985).

³ When using the phrase 'lesbian and gay rights movement', I refer to a loose coalition of rights-campaigning groups and individuals. The lesbian and gay rights movement is, itself, part of a broader 'lesbian and gay movement'. In this thesis, my concern is with the former. Much of the sociology of social movements literature is concerned with defining and delimiting the substance and activities of social movements themselves - such an inquiry is not the focus of my research. See, generally, Zald and McCarthy (1987); Touraine (1985); Melucci (1989); Offe (1985). See Epstein (1990) and Plotke (1990) for a critique of 'new movement' theory.

entailing a variety of strategies and attendant mobilisations. These include political campaigns to amend existing anti-discriminatory legislation to include a 'sexual orientation' ground, and individual law suits launched under these statutes and others to either protect jobs or housing, or to demand various social benefit currently restricted to heterosexual couples or families.

The hoped for achievements through law reform are, on one level, obvious. A gay couple litigating against a state refusal to register their marriage seeks the legal recognition of their relationship as a marriage, with all the benefits (and burdens) that attend such an acknowledgment. A lesbian and gay organisation lobbying for statutory reform to legislative definitions of "spouse" hopes for the official recognition of lesbian and gay identity within state welfare, taxation, and other similar schemes.

But the goals of law reform initiatives, in most cases, also go further. Lesbian and gay rights movements, from their inception, have engaged in legal struggle partly on the basis of what changes in legal provision signify more generally. Aside from the tangible benefits that are sought, organisations and individuals have proceeded on the 'law front' with the belief that law reflects societal fears and prejudices. In keeping with the demands of other

marginalised groups, lesbians and gay men have argued that progressive law reform signals to bigots and to those who would discriminate, that such attitudes and behaviours are no longer acceptable. In so doing, legal 'liberalisation' marginalises those who were formerly the 'moral majority', at the same time as encouraging lesbians and gay men to 'come out' with at least the official promise to maintain their security and safety.

The acquisition of rights reforms encourages more than 'coming out'; perhaps as significantly, the positive (as opposed to negative criminal law constructions) legal recognition of lesbian and gay sexuality promotes feelings of self-worth, citizenship, and community identity. Furthermore, the very struggle for these goals, whether or not they are achieved, is a politicising process facilitating mobilisation, identification, heightened public awareness, and the development of a lesbian and gay consciousness, practice, and theory.

For lesbians, gay men, and their supporters, the efforts of rights campaigners have always been the subject of both unqualified praise and critical comment. There are those who advocate rights for lesbians and gay men without hesitation (Jefferson, 1985; Harvard Law Review, 1989; Mohr, 1988), and those who, in contrast, question the goals and accompanying strategies of rights acquisition (Lynch, 1982; Kinsman, 1987; Eaton, 1991). Many who fall into the

latter group articulate a politics, drawn from socialist and feminist traditions, which problematises the possibility of achieving substantial shifts in social relations through the reform of dominant legal ideologies⁴ and institutions.

Consequently, this thesis takes a somewhat different approach to those works by academics which tend to uncritically advocate and argue for the extension of legal equality to lesbians and gay men. And, yet, neither do I prophesy doom as a result of such developments; my intention is to present 'lesbian and gay rights' as a "problematic" - a location from which questions arise (see D. Smith, 1987:89-91). I take as my problematic that rights movement with which I am most familiar - as participant and observer - the movement for lesbian and gay rights in Canada.

The thesis is focused around three central questions: [1] how are lesbian and gay subjects and subjectivities constituted through human rights law and what forces produce these legal constructions? [2] how open is legal discourse to receiving 'new' constructions of homosexuality? [3] what is the relationship between the lesbian and gay rights movement, its principal opponents the New Christian Right, and 'the state' - how do the

⁴ I use the word 'ideology' to mean a framework of meaning within which social relations are understood.

struggles of social movements for interpretive authority shape the law-making process (and vice versa)?

B. Key Arguments and Themes

My analysis is informed by insights drawn from several theoretical approaches to the study of law and social change. These include marxist theories of law and ideology, feminist modifications of this approach, critical legal studies and its own internal critics, and the application of poststructuralist ideas to legal analysis. I also draw upon three other literatures: feminist and lesbian and gay studies, and research in the sociology of religion, and social movements. There are three key arguments and several subsidiary themes running through the text and I note influential theoretical traditions, and particular writers, in the pages which follow.

[1] The dominance of a liberal sexual politics

My first argument is that, in lesbian and gay law reform battles in Canada, liberal and conservative sexual politics dominate public debate. Since the mid-1980s, a liberal 'minority rights paradigm' has been ascendant whilst radical sexual politics, of both the left and the right, are not as visible within public discourse on rights and sexuality. The dominance of the liberal equality paradigm has contributed to the public presentation and

perception of lesbians and gay men as a discrete minority community, whose innate 'difference' should not result in prejudice and discrimination.

Many gay activists have found the idea that sexuality is neither a personal nor political choice appealing; immutability has provided a way out of medicalisation, experimentation, and behaviour modifications. Nevertheless, I argue that this idea may have outlived its usefulness, at least in the present political climate of western, capitalist democracies. I further show how the liberal equality paradigm, and the concept of immutability, is fundamentally at odds with those feminist theories of sexuality which deconstruct the 'naturalness' of heterosexuality and gender identities. I suggest that much lesbian and gay legal struggle obfuscates, rather than illuminates, such analyses. Having said this, however, I also explore the extent to which dominant legal ideologies themselves shift and are re-constituted through social struggle.⁵ I also examine human rights legal developments as regimes of regulation (Foucault, 1976; Bumiller, 1988), considering their somewhat different contribution to the construction of sexual subjects than that produced by previous criminal law. Dominant frameworks of meaning cannot be harnessed by social movements without those

⁵ Analyses of law and ideology are found in Gavigan (1986, 1987); Hirst (1979); Hunt (1985); Smart (1984); Sugarman (1983); and Sumner (1979), among others.

frameworks in turn shaping and re-constituting actors and communities.

There are three subsidiary questions I address within this first argument. Why is the minority rights paradigm so hegemonic? When and why do liberal perspectives predominate over conservative ones? And what happens when radical sexual politics enter public arenas, particularly law-related ones?

In using marxist analyses of law in responding to the first of these questions, I argue that the extension of formal equality rights to lesbians and gay men in capitalist democracies is not necessarily in conflict with a 'modern' application of traditional western liberal values. I go on to suggest that social policy decision-makers, including politicians, 'media chiefs', and judges, are drawn predominantly from groups exemplifying dominant political ideologies (see Sumner, 1979; Mandel, 1989; Bakan, 1990, 1991) and their discourse and decisions on gay rights issues reflects this. I also use poststructural discourse analysis to show how law, as a regime of Truth and knowledge, admits some external knowledges but excludes others (see Smart, 1989). And, finally, I argue that social movement activists, in deciding to enter any public sexuality debate whether legal or otherwise, engage in a process of self-censorship whereby the movement's internal

politics are deliberately transformed and rendered compatible with the perceived prevailing social climate.

In exploring when and why liberalism predominates over conservative sexual politics (and vice versa), I trace several distinct but related dimensions to law reform struggle. For example, in discussing one gay rights case (Mossop, 1989, 1990), I show that litigation results were partially dependent upon the luck of the draw - which decision-makers were selected to hear the case at its various stages. Yet, the progress of gay rights is not determined by individual whim. The decisions of adjudicators and politicians are historically and culturally contingent. They are severely constrained by their perceptions of the prevailing 'social climate' - what (or whose) construction of homosexuality is ascendant in the 'public sphere' at that historical moment. Liberalism's hegemony, for example, is clearly shown in several examples, such as the (slow and uneven) development of lesbian custody case law, the increasing success of gay rights legislative amendments, and the transition from the criminal pathologisation of homosexuality to the provision of lesbian and gay equal opportunity policies in the armed services and police.

This 'prevailing social climate' is in part shaped by shifts in medical-moral discourse, and the outcome of gay rights law reform initiatives tends to follow the winds of

change in psychiatric and other professional constructions of homosexuality. Thus, the role of 'experts' in the law's construction of sexuality is something I closely consider (Smart, 1989). At the same time, however, powerful professional discourses, whilst significant constituters of social meaning, are not determinative of sexuality; the struggles of social movements, and the interjection of 'other knowledges', is also important in shaping social understandings. And legal discourse is not completely immune to such 'invasions'.

Thus, another factor influencing the liberal or conservative fate of lesbian and gay rights reform is the role played by social movement activists. Individuals and groups can 'infiltrate' and influence political parties despite and against the 'prevailing social climate' (and, in the process, hope to create a new one). In Canada, the Conservative Party has its 'pro-family' wing, and the left-of-centre New Democratic Party its 'lesbian and gay caucus'. In Britain, for example, Martin Durham (1991) has argued that Section 28 was an initiative of the 'moral right' in the Conservative Government and did not have the active support of the Party mainstream.

Finally, there is no one, uniform 'social climate'. Attitudes and existing policies towards homosexuality both reflect and produce the balance of power between opposing social movements. The process of law-making is, in this

conceptualisation, a terrain of struggle where diverse interests vie for popular support in what one conservative Christian text calls the "war of words" (Dobson and Bauer, 1990).

In addressing the third question I posed above, what happens when radical perspectives on sexuality, of both rights and left, do enter public arenas, I consider various interventions in gay rights campaigns and litigation by both feminists, and their New Christian Right opponents. I show that such perspectives are sometimes ridiculed, or, more often, simply ignored. At the same time, however, definitions of 'radical' are not static and unchanging; as John D'Emilio (1983:244) has noted, early pioneers in lesbian and gay rights reforms were radical in their time. And, of course, Christian prohibitions on homosexuality, now deemed quaint and 'unscientific', were once the law of the land. Furthermore, the impact of radical interventions must be evaluated in the long-term, and not simply by calculating specific 'wins' or 'losses'. As Gusfield (1981) has argued, social movements effect shifts in meaning over time, despite 'losing' individual battles.

[2] Liberalism and social change

Given that liberalism has, to some extent, been able to provide a certain measure of 'lesbian and gay rights', what are its limits? My second principal argument is that

whilst liberalism (with respect to sexuality) is hegemonic, it is not impervious to change, and, perhaps, not inherently facilitative of the status quo (see Mouffe, 1988, 1992). The relative fluidity of what I call the liberal 'minority rights paradigm' allows for the recognition of 'new' identities as represented by 'new' social movements such as those of lesbians and gay men. These movements have been somewhat successful in shifting the boundaries of legal liberal constructions of homosexuality - from the 'deviant and dangerous offender', to the 'minority' subject of human rights protection, to the 'spousal' recipient of social benefits previously available only to heterosexual couples.

In the process, the articulation of principles such as 'equality' together with 'lesbian and gay' has, to some extent, caused cracks in the firmament of 'universal' heterosexuality. Lesbian and gay law reform struggles have prompted the concomitant defense of heterosexuality and traditional gender identities, a task unthinkable in a previous era of homosexual pathologisation. In this way, lesbian and gay rights campaigns, even those which appear ostensibly less radical in demands and rhetoric, can be seen to be, perhaps within Judith Butler's (1990) analysis, "subversive" of gender and hence "troubling". I thus contend, for example, that whilst legal liberalism has, arguably, only succeeded in entrenching and obscuring class divisions (Fudge and Glasbeek, 1992; Mandel, 1989), the

same is not the case for sexuality where concrete shifts in social meanings and practices have taken place.

I also discuss the role of 'rights', as demands and rhetoric, within lesbian and gay legal equality campaigns. In avoiding the polarities of the 'rights debate' in social theory, I argue that 'rights' are neither 'good' nor 'bad'. Instead, rights claims and rhetoric play unpredictable and contradictory roles in social struggle; and their 'effects' are complex and changing. In many ways, I advocate a 'de-centring' of rights, not so much within social struggle (where I see rights demands as largely inevitable), but within academic analyses of such struggles.

Finally, however, I argue that the connection between rights acquisition for lesbians and gay men and the transformation of social relations which produce lesbian, gay, and other identities is not necessarily obvious or inevitable. Such a bridge must be built, not awaited. Furthermore, the inclusion of lesbian and gay identity within human rights law has, as I argued above, contradictory effects, including the entrenchment of a minority identity and politics.

[3] 'Law and the state'

I also use the example of lesbian and gay rights struggles in Canada to complicate analyses of law and the

state which see the two as one, and that one as homogenous in character - whether as a tool or instrument of the capitalist class (Mandel, 1989) or patriarchy (Mackinnon, 1983, 1987), or as reflecting 'a' 'dominant ideology' (Collins, 1982; Gabel and Feinman, 1982). I also question poststructuralist analyses of law which tend to reject notions of the state and, in my view, reify the capabilities of legal discourse to produce subjects.

Instead, this thesis proceeds from a conceptualisation of state law-making processes in the field of sexuality as sites of struggle. In my view, there is no one 'state' with 'a' position on or 'interest' in lesbian and gay law reform. The perspectives of the federal justice department, the federal Minister for Women's Issues, the Secretary of State's funding administrators, the judges at the Federal Court of Appeal, the adjudicators administering human rights laws, individual employer-managers in the public service, and members of parliament from all political parties - all these and more are linked through their location in state structures but can not be said to share much beyond that. In the arena of lesbian and gay rights, confusion and contradiction is far more prevalent than any common intention or strategy.

Emerging within this thesis, therefore, is a view of legislation and policy in the area of lesbian and gay rights that sees such developments as both reflecting and

contributing to the constitution of the balance of power between social movements. In some ways, my understanding of the relation between social movements and the state is an instrumentalist one in that my analysis suggests that state bureaucracies and processes can be 'won' (temporarily) by those seeking to further or halt changes to the regulation of sexuality (see also Cooper, 1992).

C. Chapter Outline

This first chapter concludes with a discussion of research methodology and ethics. Aside from describing and evaluating methodological approaches and material sources, I also place myself within the text, critically assessing my own role as academic and potential 'thesis subject'.

The second chapter provides a brief and selective history of the Canadian lesbian and gay movement's engagement with human rights law reform, from the 1970s to the present. Besides offering an explanation for why some lesbians and gay men chose to advocate such reforms, I explain the structure of human rights regimes, and provide an overview of 'sexual orientation' case law in Canada. I also consider several different 'paradigms' of sexuality expressed by lesbians and gay men in their campaigns and litigation, and conclude by reviewing the development of 'lesbian and gay legal studies'.

The third chapter launches into the substance of the research. Taking the struggle for a 'sexual orientation' amendment to Ontario's Human Rights Code (popularly known as 'Bill 7') as a 'case study', I explore the processes leading up to the enactment of the amendment in 1986, its effects and implications, and the politics of the debate between opposing social movements. I argue that this lesbian and gay struggle for inclusion within human rights legislation had diverse implications. On the one hand, the lesbian and gay 'subject' publicly emerging from the conflict was one informed by liberal legalism, and not one that challenged such constructions. Further, the campaigns tended to strengthen and legitimate existing legal frameworks, thus undermining attempts to reform and replace them. At the same time however, the struggle succeeded in rendering visible lesbian and gay sexuality and occasioning public debate - albeit within a liberal paradigm of 'tolerance'.

The following chapter uses Bill 7 and other examples to consider debates about the politics of rights. I focus upon the role of rights as rhetoric, examining conflicting theories of rights efficacy in social movement struggle. I suggest an analysis which, with respect to the Bill 7 contestation, moves beyond discussing the role of 'rights' in the abstract to one exploring the meanings of rights within particular contestations. I argue that the 'lesbian and gay rights movement' can be seen as a modern movement

for inclusion in frameworks of social citizenship, and that the deployment of rights rhetoric must be assessed within this context. Whilst I agree with some of the positions of the 'rights critics', I nonetheless put forward a view of rights which considers such struggles both in perspective, and in their specificity.

The fifth and sixth chapters explore the politics of the primary movement standing in opposition to lesbian and gay legal equality - the New Christian Right. I examine the history of this movement, and then centre my analysis upon three of the organisations intervening in one gay rights case - the Mossop litigation. Chapter five details the sexual politics of this movement, whilst chapter six asks what occurred when these organisations attempted to intervene in the legal arena. I argue that the evangelical Christianity of these organisations, which motivates and inspires their opposition to lesbian and gay equality (as well as anti-racism, feminism, and so on) is, as with feminism above, rendered invisible within the legal process. I explore why this happened, but also suggest, however, that the effects of the New Christian Right must be assessed at a deeper level. I ask, in fact, whether the conclusions I reach in this chapter have implications for feminist, and lesbian/gay legal struggle.

The seventh chapter considers the role of judges and experts within litigation. I first show the conflict

between legal processes and conventions, and the external knowledges 'experts' bring to their interventions. I then go on to consider what judges do with the 'expert' evidence that is presented to them, and also suggest why judges reach the decisions they do in lesbian and gay rights cases. This chapter contains discussions of the relative hierarchy of external knowledges within legal discourse, the ideological politics of individual judges, and the constraints and limitations within which judges can express these politics. I conclude by assessing sociology's contribution to the 'lesbian and gay legal subject'.

D. Research methodologies and ethical considerations

[1] 'Empirical sources'/'primary materials'

This thesis is grounded in detailed studies of two events in the struggle for lesbian and gay equality in Canada. First, the 1986 campaign for a sexual orientation amendment to Ontario's Human Rights Code. Sources for this study were: [a] documents of participating social movement organisations, particularly those of the Coalition For Gay Rights in Ontario [b] legislative debates [c] press coverage [d] interviews with individuals active at the time and [e] my own experience of participating in the campaign. My second 'empirical study' is that of the litigation process in the Mossop case. For this analysis, I have drawn upon: [a] the materials of participating social

movement organisations [b] the legal submissions of all parties [c] the texts of the judgments and [d] interviews with litigants, lawyers, 'expert witness', and various social movement actors.

In addition to these two case studies, I draw upon a variety of other sources in historically describing aspects of Canadian lesbian and gay law reform initiatives, as well as documents and interviews relating to other lesbian and gay equality cases. As indicated earlier, and in contrast to much (particularly American) legal analysis, I do not focus exclusively upon legal judgments. Only in Chapter 7 do I specifically engage in 'case analysis'; in other chapters, I consider statutory law, legal institutions and institutional regimes, political rhetoric, as well as other documents produced during legal struggle such as legislative briefs, affidavits, and appeal court submissions by intervening parties, as well as the views of actors in the process.

For example, in Chapter 3, I analyse the politics of human rights law reform within the struggle for a sexual orientation amendment to Ontario's Human Rights Code. I utilise several strategies, including: a textual analysis of the Code itself; critically examining organisational briefs and documents and comparing them to those produced during an earlier period of attempted reform; conducting a short media analysis; examining reports from the Human

Rights Commission; and drawing on interviews and accounts relating to the struggle.

Limitations to these materials include the fact that they are English-language only and largely Ontario based - the 'empirical sources' reflect the topic chosen. Legal struggle is an activity engaged in by primarily one sector of the Canadian lesbian and gay rights movement, usually located in large urban centres; campaigns tend to be led by relatively stable, structured organisations. Lesbian and gay litigants are often middle class professionals. This project, therefore, does not claim to represent or consider the diverse forms of lesbian and gay politics, nor the activities of more submerged, less publicly visible, movement sectors. Whilst this is undoubtedly a restriction to the scope of the thesis, it is, in my view, a necessary one.

[2] Methodologies

[i] analytical approaches

In terms of specific analytical strategies, I have employed several diverse approaches. For example, I employ a variant of a methodology advocated by Colin Sumner (1979) for examining the ideologies of law. He suggests such strategies as tracing the history of an ideology, following the ideologies of judges across a range of decisions, and

substantiating 'readings' by reference to other texts and debates (1979:282-5). In contrast to Sumner, I do not believe that this gives a "scientific" reading of law whereby the 'true' meaning of a legal decision can be discovered. I also have a different understanding of ideology in that I use the term to mean a framework of meaning within which social relations are understood. Nevertheless, I believe that Sumner's methodology provides a helpful interpretation of why judges reach the decisions they do.

I draw on Sumner's approach in Chapter 7, which analyses several gay rights judgments. There I explore the different ideologies of decision-making forums. For example, in Mossop, the human rights adjudicator, I argue, expressed a broad liberal ideology in her attempt to find in Mossop's favour. Her judgment is based on ideological elements historically associated with liberalism, such as the public/private divide, and values of tolerance and democracy. This, I suggest, is in keeping with the different mandate and personnel of administrative tribunals, and also reflects the particular politics of the feminist adjudicator herself. The judges of the Federal Court of Appeal, particularly Marceau who gave the key judgment, are, in contrast, conservatives, who insist upon strict interpretations, and non-intervention in market relations.

In this same chapter, I also explore the Mossop decision at other levels. The work of Carol Smart (1989) offers an analysis of the relation between law's epistemological power and feminist interventions, exploring the ways in which legal discourse constitutes its 'truth' and excludes marginal knowledges. So, for example, I read the judgments, not just for their politics, but also for how legal knowledge is produced, how other 'ways of seeing' are structured out, and how various linguistic techniques, such as rhetoric and metaphor, are deployed to achieve the desired result. I have tried to use both ideological and discourse analyses as counter-balances to each other, in an effort to explore material at different levels, rather than attempting to synthesise the two approaches, or reject one altogether (see also Boyd, 1991).

For example, I noted above that in Chapter 7 I utilise a variant of Colin Sumner's (1979) ideological analysis of law. In this same chapter I also employ 'discourse analysis'; I consider the 'lesbian and gay subject' constituted through 'expert' discourses, and the role of legal arenas as sites of struggle between competing knowledges. In my view, 'ideological' and 'discourse' analysis provide different 'takes' on social phenomena and, in this thesis, do not compete with each other for ultimate authority (but see Barrett, 1991).

Parts of Chapters 5 and 6, on the New Christian Right (NCR), reflect a traditional social science methodology. Here, I rely upon quantitative data on religious views, as well as conventionally empirical studies of the NCR movement. At the same time, the chapter 'deconstructs' NCR texts, and explores the disjunction between their internal sexual politics and the substance of their legal interventions. I thus read the texts on a somewhat deeper level (see A. Young, 1990; Valverde, 1991), and use these readings to question some of the assumptions of the 'scientific' studies.

[ii] 'other voices'

In general, I have adopted a strategy, also advocated by Ann Opie (1992), which seeks to challenge my own ideological perspective. By doing this I hope to problematise, using myself as 'subject' (see also Stanley, 1990), any simple search for 'one right answer'. I do this by, at times, creating a 'dialogue' within the text between myself as author, other academics, the interviewees, and perspectives from alternative, non-academic media. With respect to these latter 'voices', I have made some effort to include a range of lesbian and gay experiences, drawing upon movement publications, oral histories, and autobiographical accounts. I also, at times, refrain from 'analysing' or 'commenting' upon statements quoted from interview transcripts. The views of interviewees are,

occasionally, allowed to stand on their own (as mine do), without the interference of 'authorial interpretation' (I discuss issues related to the selection of quotations below). Such practices help to deter the researcher from simply 'using' 'subjects' for her own ideological ends (see Opie, 1992). I do not, however, claim to have overcome this (or any other) methodological problem.

Nevertheless, I aspire to this goal in Chapter 4, for example, where I review arguments for and against the acquisition of rights. In that chapter, I draw on other sources, such as an autobiographical book by Karen Thompson (1986), a lesbian whose decade-long fight for legal guardianship of her brain-injured partner was the impetus for her radical politicisation. And, in addition to presenting the views of opposing theorists and indicating my own perspective on this issue, at the same time I have included the views of interviewees. Not just on 'rights' per se, but also their views on the academic 'rights debate', much of which is not at all complimentary.

[iii] reflexivity

Above all, I hope that this study embodies several qualities often discussed under the general rubric of 'research reflexivity' (Woolgar, 1988; Atkinson, 1990). This is usually understood to entail the creation of a text which is self-aware, does not pretend 'objectivity', and

does not claim to be a 'scientifically true' explanation of social phenomena. Rather, the author of a reflexive text is self-consciously aware of her own bias and goals, and presents these 'upfront', rather than attempting to transcend them through the adoption of positivistic techniques.

Furthermore, a reflexive study is attentive to its own conventions, strategies, and modes of representation. For example, the subsequent section of this chapter, entitled 'the "I" in the text', employs a confessional style in which I describe characteristics and histories of myself ostensibly bearing some relation to the topic I have chosen to research. This strategy, aside from providing 'personal information' and showing the origins and motives for my own perspective, may assist in legitimating the thesis by highlighting my own experience and 'good intentions'. Chapter 5, for example, on the sexual politics of the New Christian Right, emphasises the negative and hateful dimensions of this movement. Whilst I also note the positive things NCR organisations provide for their members, these 'pastoral' qualities are not given much prominence. Arguably, then, given my own political understanding, the portrait I paint of the NCR is somewhat one-sided. Finally, the entire thesis is written in a very conventional academic style, following and therefore legitimising 'acceptable form and standards'. There has been little attempt to disrupt this.

[3] Dilemmas of identity and ethics

[i] the "I" in the text

Here, I wish to explore my own social location vis a vis the research. I came to this project with specific concerns about lesbian and gay legal strategies. My political perspective was informed by a variety of struggles and institutional regimes in which I had participated. Aside from having studied for university degrees in sociology and law, I had been moderately active in Toronto lesbian feminist and gay politics for over ten years -initially around violence against women, then in the pro-choice movement, and, later, around HIV/AIDS issues. I had also been peripherally involved in issues around antisemitism and racism. Only once was I involved with a law reform campaign; indeed, 'gay rights' was, for me, synonymous with a gay male liberal agenda, and law reform was something which, until law school, I rarely considered a serious vehicle for social change.

Whilst studying for my law degree, I began to note the frequency with which human rights law reform and 'rights rhetoric' was evident within lesbian and gay community media, and public debate. During my first year of law school, I even participated in one such struggle (the Bill 7 episode of Chapter 3), despite having many reservations. It was, therefore, contradictions and questions such as these which led me to this project. In my third year of

the law degree, I wrote a paper from which, ultimately, this thesis emerged. I thus viewed myself as, somewhat paradoxically, having one foot in legal academe, and the other in social movement activism.

An example of how the relation between my various selves plays out in this project is shown in Chapter 4. For most of the chapter, the "I" in the text is that of the legal academic, applying a 'critical perspective' to her 'subject-matter'. However, the chapter includes a personal story, reflecting upon my own involvement in the Bill 7 struggle, and positioning myself as a 'subject' in the text.

Aside from this point about juggling identities within academic work, other issues are raised by my location within the movement being studied and academe. For example, I chose to investigate Canadian developments at a British university. Whilst I had fairly good access to most materials I needed, and was able to return to Canada to conduct research if necessary, this distance raised problems. Correspondence only reveals so much. It is not the same as actually living and working in the community, as I had done in the past. I was thus acutely aware of these constraints, although I did not find them sufficiently insurmountable as to cause a re-think of what I was attempting to do. Indeed, the opportunity to explore and experience British theory and European politics at

times provided important insights and counter-balances to both the insular world of North American academe, and its highly legalised culture. For example, in Britain, the lack of procedural rights now deemed unquestionable in Canada (under the Charter) led me to reconsider Canadian Charter critiques. Also, discussions around creating a British Bill of Rights helped to clarify my thinking on the Canadian Charter.

An additional concern, partly occasioned by distance, was my lack of political involvement in the Canadian lesbian and gay movement itself. I tend to believe that academic work is strengthened through being more directly involved in the activities one is 'studying' - that campaigning, marching, leafleting, and generally participating in social movement projects provides important insights and feedback into the development of social analysis. The thesis, in my view, therefore suffers from this distancing. On the other hand, the fact that I had been involved in the movement I was writing about could have been, looked at a different way, a drawback. I was well aware of the compelling reasons why lesbians and gay men support rights struggles; I had done so myself. There might have been a tendency on my part to over-emphasise potential benefits - ones that I myself experienced - thereby privileging my own standpoint.

There are those who would argue for doing just this (Sandra Harding, 1986, 1991; Harstock, 1983; D. Smith, 1987). I, however, am more persuaded by 'standpoint' critics who argue that 'identity standpoints', whilst perhaps being a necessary stance within some forms of political campaigning, do not reveal 'true' or 'better' interpretations of social phenomena within academic research (see Flax, 1987; Kline, 1989b). Furthermore, such standpoints impose a homogeneity upon the 'category' being claimed which can not reflect or represent the diversity within it.

Another issue revolves around the question of how membership in a 'legal elite' might effect the shape and content of my thesis. Law is extremely powerful, and quite seductive. During the writing of this thesis I was asked, for example, to comment on the legal submission of a coalition of progressive organisations intervening in the Mossop case. Agreeing to the request was to perhaps become caught up in the status of such a task, entranced with the potential power to influence the thinking of judges of the Supreme Court of Canada. At the same time, I questioned the whole process of having legal academics give these kinds of 'opinions', becoming a lesbian and gay legal elite, indeed perhaps creating a new legal industry (as in the U.S.), thereby contributing further to the 'legalisation of politics' I criticise in this text.

Despite these contradictions, I went ahead and gave my comments. In actuality, my primary concern when writing my 'opinion' was not how to persuade Supreme Court judges, but, rather, how to be sufficiently critical of the whole endeavour without offending or patronising the lawyers who wrote and were committed to the intervention. My comments ultimately reflected my own discomfort with participating in the process. My decision to comment on the submission was a negotiation between various positions. I have, however, tried both to remain conscious of these contradictions and to not exclude myself and my own work from the critical comments I make.

[iii] the 'researcher' and the 'researched'

I have discussed above questions to do with my own location within the research I have undertaken. Here, I wish to elaborate on some of these issues with respect to interviewing and publication. Although interviews do not comprise the core substance of 'source material' for this thesis, the issues raised by the interview process highlight dilemmas that extend beyond it.

Interviewing

Feminist and other sociological literature on interviewing tends to revolve around three problematics: interviewing the 'dispossessed', thereby highlighting the

researcher's 'power over' her subjects (Oakley, 1981; Roberts, 1981; Opie, 1992); joining 'radical' groups covertly and collecting information in secret (eg: Bulmer, 1982); additionally, there is a small literature on interviewing the "locally powerful" (Bell, 1978), meaning bureaucrats and professionals with local decision-making powers, usually working within key social institutions (eg: Smart, 1984). The first approach, particularly its feminist manifestations, seeks to develop interviewing strategies in order to minimise power inequalities. Also posed are questions to do with 'empathy', 'identification', and 'appropriation'. The 'covert research' methodology literature finds its ethical dilemmas in the very nature of researching secretively, and in the problems arising from publishing studies of people who have not consented to become research subjects. Those who have written about studying the 'locally powerful' identify the researcher's relative inequality in the interviewing process.

Whilst these literatures raise important questions and research dilemmas, their applicability to this project is not obvious. Relations of power, between myself and my interviewees, did not fit comfortably into any of these paradigms. When interviewees cannot be placed into a category of 'dispossessed' or 'powerful', and especially when they express views you abhor or hold status positions well above yours (which does not necessarily mean that they are 'powerful' within the problematic being studied), the

relation between researcher and 'subject' becomes more complex. Unfortunately, there is little methodological literature on this.

In the case of the lesbians and gay men I interviewed, I was both 'one of' them, thus feeling such things as empathy and solidarity, whilst at the same time being one of 'those' - namely, academics - thus feeling their hostility and my defensiveness. I was conscious that some individuals must have assumed my support for their positions, granted interview access, and at some level 'trusted' me, partially based upon my ability to present myself as 'a lesbian'. Several of the contributors to the collection Doing Feminist Research (1981) make similar points in their own studies.

On the other hand, in interviewing fellow members of the Canadian lesbian and gay movement, in many ways I was not the power'ful' person in the relation. On the contrary, I was a student interviewing, for the most part, lawyers, well-paid civil servants, and teachers. Furthermore, all three of the lesbian and gay litigants I interviewed patronised me - in the sense of finding some of my questions irrelevant or silly, and assuming my concerns were not those of 'real people'. For the most part, those I interviewed were savvy political actors who had given many interviews and knew how to handle 'researchers'. The interviews themselves, then, are products of our respective

attempts to ascertain each other's agenda, determine degrees of trustworthiness, and so on. Thus, whilst these individuals were, arguably, dispossessed of lesbian and gay equality, in many other ways their lives were quite privileged.

A slightly different, but related, set of concerns emerged from interviews conducted with members of the New Christian Right. Over the course of the first year of my doctorate, I developed a friendly correspondence with several members of conservative Christian organisations, a number of whom regularly sent me newsletters, positional statements, and other organisational information. I went on to interview two of these individuals, plus one other I had not contacted previously.

My first concern was to gain access, and thus whilst I did not claim to be born-again, I most certainly did not present myself as a Jewish, lesbian, socialist, feminist. I was not engaging in covert research, but neither did I wish to jeopardise the project. I did not lie, but I did not tell the whole truth - I said I was a sociologist of law (which, from their perspective, was bad enough). During the interviews, I was occasionally put into the position of having to respond to a direct question about my own religious affiliations. Each time, I avoided the question, giving an ambiguous answer that revealed very little.

The tapes resulting from these interviews are products of the curious relation between myself and people I have despised, feared, and fought against for most of my life - the same, of course, is true for them, vis a vis me. Various researchers who have interviewed conservative Christians, and even more radical right-wing groups, have written about the process by which one grows to feel empathy for 'the enemy' (eg: Aho, 1990). I have been no exception in this regard. The interviews I conducted provided me with a very different 'take' on a group of people I would previously have dismissed as 'religious fanatics'. I could not escape the fact that they were 'nice' towards me, that they did their utmost to assist my research, and that they rather poignantly expressed gratitude that 'at least someone is interested in what we have to say' (see also Klatch's discussion, 1987:17). At the same time, I knew that the interviewees were utterly opposed to everything I believed in.

The situation was even more complicated by my gradual realisation that the New Christian Right interviewees perceived themselves to be power'less' in society, and people such as myself ('secular humanist' academics) to be far more influential in setting public agendas and determining the character of social life. This view contradicted my own which, historically, had attributed far greater social power to 'them'. Instead, I found I was

interviewing neither the 'locally powerful', nor any other simple elite. Not only did I not feel power'less' when speaking to NCR members, my knowledge of how they constructed me (as an academic producer of powerful secular knowledge) meant that I instead perceived them to be rather vulnerable. I thus felt uncomfortable leading them to believe, through sympathetic grunts or smiles, that I might be supportive of their cause. On the other hand, I was also motivated by an activist concern to 'get information on these people' (in this sense the research resembled the covert model). To do this, I needed to establish some kind of trust, or empathy, during the interviewing process. And yet, I found this was achieved at a personal cost, particularly when individuals expressed the most vicious perceptions of lesbian and gay sexuality. As Rebecca Klatch (1987:18) has noted, in the context of interviewing right-wing women, research such as this involves, for the interviewer, a "constant process of role negotiation".

The interviews themselves are, therefore, products of a relation between individuals wary of, yet wanting something from the other. What the NCR respondents were prepared to say to me, and the questions I was prepared to ask of them, all help to construct the interview transcript itself. As Tait (1990:173) has suggested, interview transcripts are products of a social process, and interviewees quoted comments must be read in this light. Furthermore, the selection of quotations is itself a

politically-charged process; and, yet, abuses can only be controlled, not eliminated.

Publishing

Finally, there is a 'politics of publication' issue. Here, I wish to discuss the issue of how the publication of research implicates the relation between the academic and her 'subject', and creates, for the researcher, an authority from which to speak.

Before beginning my doctorate, a paper I wrote was published in a Canadian law journal, and was subsequently re-printed in a collection of 'women and law' course materials. In this piece, I discussed, among other things, the political implications of a specific case being waged by Karen Andrews, a 'lesbian litigant'. The construction of her case, I suggested, had dubious implications for 'women's liberation'.

During the course of my doctoral research, I arranged to interview Andrews and, towards the end of our conversation, asked her to tell me what she thought of the article. She said that it had been very strange to see herself as the subject of an academic paper, and had felt that, as a person, her life had somehow been degraded and her concerns trivialised.

I was out there, outside myself. I had become a 'thing'...I saw myself in the trenches getting my hands dirty...[during the litigation] I had got so many vicious phonecalls...[then] I thought,

this is an intellectual exercise...who reads the Osgoode Hall Law Journal anyway? (Andrews, interview)

In speaking with Andrews, I was at first upset and ready to re-consider the project as a whole. However, it was also clear to me that she had assumed I was someone with little or no experience in the lesbian and gay movement, and had been engaged in a kind of 'armchair' elitism.

I do not know the 'right' way of resolving this problem. Were I to self-censor every word in this thesis that other lesbians might disagree with, there would be little point in continuing. On the other hand, I cannot ignore the concerns of those who, like Karen Andrews, express how they have experienced being a 'research subject'. In my view, research must be conducted ethically, within the context of a set of values. Publication of research should be sensitive to how 'subjects' will read the text, but cannot be determined by possible or potential readings. One can never 'control' for this anyway. Nevertheless, I have tried to keep Andrews' comments 'in mind'.

Concluding remarks

In this thesis, I have utilised three primary devices in an attempt to respond to the problematic of the researcher/researched relation. First, I have tried to indicate that my own position lies on both sides of this

dichotomy. At various points in the text, I speak explicitly from my own experience in lesbian and gay politics, and offer 'my story' as one to consider. I have thus tried 'to subject' myself, along with others, within the text (Stanley, 1990:113). Second, wherever possible, I have included extracts from interviews where the views of lesbian and gay interviewees are at odds with my own. To some extent, then, and in some places more than others, I have attempted to create a dialogue between actors - between academics and activists. I have previously mentioned that I, at times, leave the views of others to stand on their own, unmediated by my direct commentary. Third, I have sent my work to interviewees and others for comments. Although I made no promises to alter my text, I considered any objections seriously, and had clear reasons for including material to which interviewees took exception. I have included their comments in an appendix to the thesis.

There is another dimension to this problematic in that I have also subjected to critical scrutiny a series of actors and organisations to which I am politically and morally opposed - the New Christian Right. I have previously discussed this with respect to conducting interviews. However, the ethical dilemma re-emerges in

other contexts as well.⁶ Am I to treat all my interviewees 'equally'?

I have concluded that this cannot be done. My project is an explicitly political one; I view it as a contribution to feminist, and lesbian/gay studies. Whilst, for example, I know that the REAL Women (RW) organisation wishes to keep its Christianity out of the public arena, my politics necessitate publicising this dimension of RW, so that like-minded people will be better-informed about 'the enemy'. At the same time, however, I am not sure whether I should justify my position here on the basis that the NCR is 'powerful', whilst lesbian and gay men are 'oppressed'. As I argue in Chapter 6, conceptualising relations of power is rather complicated when exploring the activities of opposing social movements. I thus prefer to simply acknowledge that my project is both partial and partisan. At the same time however, I have attempted to portray the individual interviewees as fairly as possible, and have tried to avoid tendencies to quote them out of context, or 'set them up' to sound silly or inane.⁷

⁶ In addition to these ethical concerns, there are other, more practical, ones that have been raised by sociologists conducting similar research. For example, I have also been attentive to questions about how this experience of my interviewees will affect their granting of access to researchers in future.

⁷ For an example of how I dealt with interviewee comments, see Judy Anderson's (President of REAL Women) editing of my draft in Appendix B, and compare with my final text in Chapters 4 and 6.

CHAPTER 2

A BACKGROUND TO LESBIAN AND GAY RIGHTS REFORM AND AN INTRODUCTION TO LESBIAN AND GAY LEGAL STUDIES

This chapter provides an account of the evolution of Canadian lesbian and gay rights campaigns, case law, and scholarship. I hope to contribute here two elements to the thesis as a whole: a history of lesbian and gay struggle in this area; and the beginnings of a critical analysis of the relationship between human rights regulation and sexuality. The first section offers an explanation for the development of lesbian and gay human rights struggles informed by ideas of citizenship and equality. I then outline the emergence of lesbian and gay human rights case law, trace the history of campaigns to amend existing human rights laws, and provide a more detailed discussion of the Mossop case, as this litigation is a key referent in subsequent chapters. I conclude by considering the emergence of lesbian and gay legal studies, particularly of the Canadian variety.

A. "To Be Coded Human" (Ross, 1990)

One starting point to considering the relationship between lesbians, gay men, and rights reform is to explore why such reforms, and the organisations which pressed for them, appeared on the political scene. One interpretation can be drawn from the work of Chantal Mouffe. Mouffe, in

her analysis of social movements and democracy, argues that modern social antagonisms often result when 'new' discursive subjects are confronted with other discursive practices which 'negate' them (1988:94). Her example is that of Enlightenment discourse giving women the opportunity to reconstitute themselves as 'equal', this constitution being a "contradictory interpellation" to that produced simultaneously by other, exclusionary discourses (1988:94-5). According to Mouffe (1988:95), the entrenchment of Enlightenment discourse, and its central value of 'equality', is at the centre of western democratic subjectivities. Mouffe's analysis, in my view, provides helpful insights into understanding the emergence and development of a lesbian and gay 'rights consciousness'.

As various writers have noted, twentieth century 'lesbian' and 'gay' identity, as opposed to same-sex sexual activity, is, historically, a relatively new phenomenon.¹ The claiming of such identities was contingent upon changes to the regime of sexual regulation, particularly the production of homo- and hetero- sexualities towards the end of the last century (see also Mort, 1987). Gradually, these 'new subjects' formed the diverse strands of what

¹ The early work of Mary McIntosh (1981; orig. pub. 1968) paved the ground for many subsequent theoretical developments. Michel Foucault (1976) is, perhaps, most often associated with articulating this 'social constructionist' perspective. Others developing this approach include: D'Emilio (1983); Faderman (1991); Kinsman (1987); Weeks (1977, 1981); and the collection edited by Ken Plummer (1981). See also, however, the debates in Stein, ed. (1990).

came to be known as 'lesbian and gay movements'. Adapting Mouffe's analysis, lesbians and gay men can thus be viewed as newly emergent subjects confronted by contradictory discursive interpellations. For example, as asexual citizens they possessed formal equality; as homosexuals they were both denied official recognition/protection and subject to constant and changing medical 'diagnoses'; as 'lesbians and gay men' they created positive, affirming community structures and culture.² The development of lesbian and gay movements, thus, followed from both the production of this distinctive identity, and its perceived exclusion (or inclusion as criminality) within dominant discourse.

Within capitalist democracies, legal 'equality' discourse is one of the foremost ways in which human subjecthood is recognised, or called into being. In more recent years, 'anti-discrimination' provision, or human rights laws, have become a significant means of ostensibly ensuring the principle of 'equal treatment'. If, as Mouffe argues, the value of equality is so intrinsically a part of western consciousness (and this view is echoed by many others), it is not surprising that many lesbians and gay men, socialised in Canada and other similar countries, demanded inclusion within and recognition by human

² For one discussion of this latter dimension in the U.S., see Castells (1983). For Canada, see Kinsman (1987).

(including constitutional) rights regimes, one of the primary forms of liberal equality.

From the perspective of many Canadian lesbians and gay men, human rights struggles were, therefore, not about rights per se, but about what rights were thought to signify - public/official recognition, social citizenship, and 'identification'. In this sense, then, the demand for 'lesbian and gay rights' is a struggle for membership in the 'human community', and perhaps also an expression of what bell hooks has called the 'postmodern' condition of "yearning", the 'urge to voice of the marginalised' (1991:18-31).

The claim for rights has always been a significant aspect to lesbian and gay social struggle (see Marcus, 1992). Over time, a distinctive rights-oriented lesbian and gay movement emerged and became an important, indeed a predominant, movement for lesbian and gay liberation. In subsequent chapters, I explore what Mouffe and others appear to underplay: the ways in which the extension of existing liberal categories to 'new' identities not only 'recognises', but regulates, contains, and constitutes them. The claiming of rights has posed significant dilemmas for lesbian and gay movements.

B. Human Rights Campaigns and Case Law

In Canada, human rights legislation provides protection from discrimination on specified grounds, such as 'sex', 'race' and 'disability', in the areas of housing, employment, and service provision. Each province has its own 'human rights code' which applies to matters within provincial jurisdiction,³ including government and the private sector. The federal sphere has its own human rights act for matters within its jurisdiction. Claims of discrimination are initiated by individuals, and investigated by a regulatory commission which endeavours to effect a settlement. Fines can be imposed, although the commissions are meant to be facilitative of 'good relations', not punitive towards individuals. Should the commission not conclude a satisfactory settlement, and providing it deems the complaint worthy, the claim is adjudicated by an administrative tribunal during a trial-like proceeding. Tribunal decisions can be appealed to the courts, within the principles of judicial review. In the following chapter, I 'deconstruct' one such code, providing a more detailed review of its provisions and structure; the above description should suffice, however, for the purposes of this chapter.

³ Canada (as of this writing) is divided into 10 provinces and two 'territories' each with its own parliamentary government. The federal government, based in Ottawa, is the national parliament. Federal and provincial governments have different, though in some cases overlapping, jurisdictional responsibilities. In terms of human rights, provinces are responsible for all matters except federal enterprises and other employers regulated by federal law (eg: telecommunications; railways; etc.).

By the 1970s, human rights legislation had thus developed across the country. Viewed as an important symbol in the struggle to combat prejudice and discrimination, this form of law inevitably drew the attention of the emerging lesbian and gay law reform movement. Two related strategies were launched simultaneously: individual complaints based on pre-existing grounds of discrimination (eg: sex), and statutory reform campaigns aimed at adding a 'sexual orientation' ground to the list of protected 'categories'.

[1] Early lesbian and gay human rights case law

Four key early cases set the scene for future developments, including the decision to focus political campaigning upon achieving sexual orientation amendments. In 1975, two men, in different parts of the country, officially complained that they had suffered employment discrimination because they were gay. In Saskatchewan, Doug Wilson, a graduate student and teacher who had been refused permission to supervise trainee teachers because he was a gay activist, filed a complaint with the Saskatchewan Human Rights Commission alleging he was discriminated against under the 'sex' ground in the Code. He argued that his 'sexual orientation' was an immutable 'sex' characteristic which he had not chosen and which should not be a legitimate basis for discrimination (Board of

Governors, 1976). Before processing the application, the Commission issued a ruling that 'sex' in the code included 'sexual orientation'. Immediately, the University of Saskatchewan (the employer) applied for judicial review of the Commission's ruling.

The higher court found for the University, stating that 'sex' was a biological, physical condition making someone male or female, and had nothing to do with "sexual proclivity" (Board of Governors, 1976:388-9). Wilson decided against an appeal (Jackson and Persky, 1982:230). This case was to have a significant effect upon ensuing lesbian and gay human rights strategies; partially as a result of this decision, the rights movement was to place renewed emphasis upon achieving 'sexual orientation' amendments, rather than to remain struggling against judicial definitions of 'sex'.

Of equal or greater import, was the case of John Damien, fired from his job as an Ontario Racing Steward in February of 1975.⁴ Having, it was perceived, no human rights remedy, Damien filed an unfair dismissal suit against the Ontario Racing Commission, hoping to gain redress (in the form of compensation) that way. Damien was to die, eleven years later, his case, due to the Racing Commission's delaying tactics, never reaching the trial

⁴ For discussion of the Damien case and its political role within lesbian and gay communities, see Jackson and Persky (1982); Hofsess (1987); Kinsman (1987).

stage. In the early years of his legal battles, Damien's experiences were to galvanise a broad base of support, and to provide a catalyst for growing demands to amend the Ontario Human Rights Code.

Another important case concerned the Gay Alliance Toward Equality (GATE) in Vancouver (see Richstone and Russell, 1981). First established in Toronto in 1973, the Vancouver GATE affiliate, among other things, published a newspaper called Gay Tide. In November of 1974, following the refusal of the Vancouver Sun to run a Gay Tide advertisement, GATE filed a complaint with the British Columbia Human Rights Commission.⁵ The Commission found in GATE's favour, and this decision was upheld (on technical grounds) by the B.C. Supreme Court in 1976 (Vancouver Sun, 1976). However, the B.C. Court of Appeal subsequently overturned the lower court's judgment on the basis that the Sun's refusal was reasonable, given popular attitudes towards homosexuality (Re Vancouver Sun, 1977). The case eventually found its way to the Supreme Court of Canada where GATE ultimately lost, although on different (jurisdictional) grounds, the Court deciding that the Sun's press freedom could not be curtailed by human rights statutes (Gay Alliance, 1979). The question of 'homosexual' rights was left unaddressed.

⁵ The applicability of the 'sex' ground to a gay newspaper seems to have been accepted, and not in dispute.

Another 'key' gay rights decision was given in Vogel. In this 1983 decision under the Manitoba human rights statute, the adjudicating tribunal denied the gay applicant 'spousal' health coverage on the basis of dictionary definitions of the term "marriage". The court simply refused to consider Vogel's claim as 'sex' discrimination.⁶

The reasoning in these cases explains, to a large degree, why lesbian and gay rights organisations sought to achieve 'sexual orientation' amendments to human rights codes. For these adjudicators, sexual orientation was deemed a species apart from 'sex'; the latter understood as conferring maleness or femaleness. The 'sex characteristic', meaning reproductive organs, thus determined definitions of marriage - a union of 'opposite sexes'. Sexual orientation, on the other hand, whether accepted as immutable or not, was about sexual practice. Lesbians and gay men could not be 'spouses' or argue 'sex' discrimination within this paradigm, despite the fact that Vogel, for example, could have received health benefits had he been a woman (or had his partner). Any analysis or even mention of heterosexuality was notably absent from these decisions.

⁶ In the late 1980s, Chris Vogel re-launched a similar case only to have both the human rights adjudicator and a lower court judge refuse to consider it (Vogel, 1992) - see also Chapter 7.

As I discuss in Chapter 7, judgments such as those given in Board of Governors and Vogel, together with the usual judicial approach in lesbian and gay child custody cases (see Arnup, 1984, 1989; Gross, 1986), reflect the conservative politics of the courts in question. But these cases also reveal several insights into the strategies of lesbian and gay rights reformers during this period. Doug Wilson, for example, chose to insist that his 'condition' (homosexuality) was 'immutable'. By presenting 'expert' evidence 'proving' this 'truth', he hoped to persuade others that he should not be discriminated against for something over which he had no control. Homosexuality was, in this construction, almost a 'disability' - an affliction for which there was no cure, and one which did not cause harm to others. This model is rooted in the assumptions of early liberal psychology. As I explain later in this chapter, this 'new' paradigm of sexuality appeared to legitimate both de-criminalisation and the extension of rights to lesbians and gay men. In the 1970s and early 1980s, this was the model of homosexuality relied upon by gay rights advocates, many of whom had also been active in the movement to de-criminalise gay male sex. In campaigns for statutory reform, a similar politics was expressed.

[2] Campaigns for statutory reform: Early organising in Ontario

Lesbian and gay law reformers turned their attentions towards achieving 'sexual orientation' amendments to human rights codes in the early 1970s. Nowhere was action more intense than in the province of Ontario. A variety of amendments to the Ontario Human Rights Code being considered by the legislature in 1972 were the focus of the first (unsuccessful) Ontario gay demonstrations specifically directed at the Code. In 1973, a step towards the desired goal was achieved when Toronto City Council passed the first policy of its kind in Canada, prohibiting discrimination on grounds of sexual orientation in City employment (Jackson and Persky, 1982:228).

1975 saw the inauguration of the Coalition for Gay Rights in Ontario (CGRO) (later the Coalition for Lesbian and Gay Rights in Ontario). The organisation's goal was to attain "full civil and human rights for all homosexual men and women and in this way to advance the struggle for their liberation".⁷ The organisation was to consist of member gay and lesbian groups with voting rights. A steering committee was established with one representative from each

⁷ "Statement of the principles, structure, program and strategy of the Coalition for Gay Rights in Ontario (CGRO)", ratified at the founding conference in Toronto January 18 and 19, 1975 and revised at the Steering Committee of the Coalition in Ottawa July 31 and August 1, 1976, Gay Archives of Canada.

group, and it was the responsibility of this committee to establish policy.

The Coalition saw its primary task as that of "struggling for the amendment of the Ontario Human Rights Code to include the term 'sexual orientation'".⁸ In addition to making several Human Rights Code demands, the Coalition, in its founding statement, called for changes to education provision, equality for gays in health care, housing, and employment, an end to discrimination in custody and adoption determinations, as well as other related items.⁹ Their seven-pronged strategy consisted of [i] lobbying provincial MPs [ii] presenting briefs to provincial parties [iii] seeking out support from non-gay community groups [iv] documenting cases of discrimination and developing attendant campaigns [v] "periodic pickets and other forms of public action" [vi] full participation of CGRO in making gay rights an election issue at all levels and [vii] the development of an education policy for the schools.¹⁰

In May 1976 two private members bills attempting to amend the Code were defeated (Jackson and Persky, 1982:231). Nevertheless, the Coalition, in June of that year, presented its brief to the Ontario legislature and

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

continued to campaign for change. In 1977, another private member's bill was defeated, yet CGRO could find some consolation in the recommendations of the Ontario Human Rights Code Review Committee (established in 1975) which included a sexual orientation clause in its amendment proposals (Jackson and Persky, 1982:232).

Ontario's lesbian and gay rights reformers were further encouraged by the success of a similar amendment in Quebec in 1977. An alliance of Quebec gay groups had begun to lobby the National Assembly for a sexual orientation amendment to the Quebec human rights charter in 1974 (Jackson and Persky, 1982:229). A formal brief was presented to the Assembly by the Association Pour les Droits de la Communauté Gaie du Québec in October of 1977, and in that same month the Quebec Human Rights Commission endorsed a sexual orientation amendment (Jackson and Persky, 1982:233). In December, as part of a wider package of reforms, the National Assembly passed such an amendment, quietly, without much debate (Ryder, 1990:67). The inclusion of sexual orientation in the Quebec Charter was to remain an isolated, and oft cited, example of such protection.

Back in Ontario, 1978 witnessed another impending period of legislative debate on proposed Code amendments

and CGRO presented its second brief to Ontario MPPs.¹¹ This document opened by defining homosexuality as "the sexual and emotional preference of males and females for their own gender" (p.3). In sections titled 'The Origins of Homosexual Behaviour' and 'The Incidence of Homosexuality in Modern Western Societies', CGRO confronted various theories of homosexuality, disputing some and cautiously adopting others (p.4). The brief stressed that homosexuals had and would always exist, and attempts to change this had and would not be successful. The bibliography accompanying these sections listed a series of sexology studies (p.5).¹²

A leaflet, prepared for the campaign which CGRO organised to accompany the introduction of Human Rights Code amendments in 1979, addressed primarily to the gay community, did not make explicit any particular analysis of sexuality. Rather, it assumed that human rights were both necessary and unproblematic. CGRO called on "gay people" to write to their provincial member of parliament and the

¹¹ Brief to Ontario Legislature, CGRO, March 1978, Gay Archives.

¹² The brief went on to describe a history of religious and other persecution of homosexuals, concluding with examples of present day discrimination in Canada. CGRO concluded by listing various groups, municipalities, and other organisations that had publicly supported the campaign for human rights.

three Party leaders, have any group to which they belonged do the same, and send financial contributions to CGRO.¹³

1981 saw another series of amendments to the Code accompanied by lesbian and gay mobilisation - but, again, all to no avail. The defeat of the 1981 Bill ended a somewhat demoralising decade of human rights struggles by Ontario's lesbian and gay rights movement.¹⁴ 'Sexual orientation' protection existed only in Quebec. Nevertheless, despite consistent setbacks, organisations such as CGRO regrouped, and went on to continue the (eventually successful) struggle for human rights reforms in the 1980s.

The 1970s and early 1980s campaigns reveal a law reform movement dependent upon the public presentation of a medical model of homosexuality and the uncritical promotion of achieving social change primarily through formal political strategies. Whilst other lesbian and gay movements were engaged in quite different forms of

¹³ "Our time has come, make it happen", CGRO, Leaflet, 1979, Gay Archives of Canada.

¹⁴ In 1979, Michael Lynch wrote in The Body Politic that, despite the failure of the various Bills, the campaigns themselves had achieved great successes. Indeed, he argued that winning human rights amendments should no longer even be on the movement's agenda, see (Jackson and Persky, eds. 1981:244). I return to these ideas in subsequent chapters where I problematise notions of 'success' and 'failure'.

politics,¹⁵ the heterosexual public were made aware of lesbians and gay men primarily through the activities of organisations such as the Coalition for Gay Rights in Ontario, as these campaigns were the most visible and interested the media more so than other forms of less conventional struggle.

The efforts of CGRO and other lesbian and gay law reform organisations finally paid off in 1986 with the passage of what was popularly known as 'Bill 7', which, among other things, added a 'sexual orientation' ground to the Human Rights Code of Ontario (see Chapter 3). By 1992, the provinces of British Columbia, Manitoba, Nova Scotia, and the Yukon Territory would join Ontario and Quebec in providing lesbians and gay men with formal human rights protections, and the federal government had agreed in principle to amend the Canadian Human Rights Act in the same way.¹⁶ One of the late 1980s key gay rights cases, launched under this latter (as yet unsuccessful) statute, was that of Brian Mossop.

¹⁵ As I noted in Chapter 1, this thesis is about only one branch of the lesbian and gay movement. During the period I am discussing here, other lesbians and gay men were very active in struggles that had little to do with reforming human rights laws, see, for example, Creet (1990); Davies (1988); Jackson and Persky, eds. (1981); Kinsman (1987); Weir and Steiger (1981); Stone (1991); and the documents of the Revolutionary Marxist Group, Gay Archives of Canada.

¹⁶ I discuss some of the factors responsible for this shift in subsequent chapters.

[3] The Mossop case¹⁷

Brian Mossop worked for the federal government (Treasury Board) as a translator. As a federal civil servant, his employment conditions were regulated by both a collective agreement and the Canadian Human Rights Act, the federal human rights code. In the spring of 1985, the father of Mossop's partner died. Mossop attended the funeral and then applied to have his absence from work considered as "Bereavement Leave" under the collective agreement, specifically stating that his lover was male. The application was denied by the employer on the grounds that his relationship did not fall within the "immediate family" category covered by the bereavement leave provision. Mossop, with the support of his union (the Canadian Union of Professional and Technical Employees), filed a grievance, which was rejected. He then laid a complaint under the Canadian Human Rights Act.¹⁸

The crux of Mossop's argument before the human rights tribunal was that the collective agreement contravened s.3(1) of the Act prohibiting discrimination based on "family status". The agreement provided bereavement leave for "immediate family", including common-law couples of the "opposite sex", and mothers and fathers-in-law. Mossop argued that this definition, and the resulting exclusion of

¹⁷ Further discussions of this case are found in Chapters 4, 6 and 7.

¹⁸ Recall that this Act does not contain a 'sexual orientation' ground.

same-sex families, constituted "family status" discrimination. His case depended upon the acceptance of his relationship with his partner being defined as "family" for the purposes of the Canadian Human Rights Act.

The principal evidence supporting this contention was the testimony of Margrit Eichler, a feminist sociologist. She argued that there was no one definition of family, that some general characteristics of families could be delineated (such as co-habitation; sharing in domestic arrangements; presence of emotional and sexual reliance; joint ownerships; etc.), and that it was better to describe situations as "familial", rather than as "family" (Mossop, 1989). Her conclusion, based on Mossop and his partner exhibiting most of these characteristics, was that Mossop lived in a "familial relationship". The adjudicator, Mary-Elizabeth Atcheson, adopted this view to support her finding of discrimination and her subsequent compensation and redress order. The Federal Court of Appeal, in reviewing Atcheson's decision, reversed her judgment (Mossop, 1990). Adopting the conservative approach of earlier case law (eg: North, 1974; Vogel, 1983), the Court found that a 'sociological' definition of family was inappropriate for a court of law. Legal precedent, the judges argued, must rule, and 'family' had never included homosexual couples.¹⁹

¹⁹ As of this writing, the case is before the Supreme Court of Canada which is expected to issue its ruling in early 1993.

Mossop is of interest, not solely for the politics of its judgments (discussed in Chapter 7), but also because, as with the Bill 7 struggle, the litigation itself became a focus for social movement intervention (see Chapters 4-6). Coalitions of lesbian, gay, feminist, disabled, and civil libertarian groups on the one hand, and conservative, evangelical Christian organisations on the other, both seized on the case as a forum in which to do battle over sexuality.

Finally, the Mossop case reflected a shift in the public presentation of lesbian and gay identity. Sociology, a discipline concerned with 'group relations' and 'structural inequalities' had come to court to inform legal constructions of homosexuality. As I discuss further in Chapter 3, this 'new paradigm' was also expressed in campaigns for statutory reform as, for example, the Coalition For Gay Rights in Ontario left behind its reliance on sexology to fight for 'Bill 7'.

[4] Constitutional litigation

Another factor contributing to the judicial re-evaluation of 'gay rights' was the coming into effect and growing prominence of the Canadian Charter of Rights and Freedoms. Enacted in 1982, the Charter is a constitutionally-entrenched document providing individuals

with a set of "fundamental rights", including freedom of association and expression, "equality", and several 'due process' guarantees. The judiciary is given the power to oversee that these rights are not denied unless such a denial can be "demonstrably justifiable in a free and democratic society" (s.1).

Early jurisprudence held that the Charter applies only to "government action", meaning that it can only be used to challenge the denial of rights by actors or agencies with some degree of 'state' nexus (Dolphin Delivery, 1986). Private persons and corporations can avail themselves of the Charter's protection, but are not themselves directly bound by its provisions. Section 1, which allows the state to justify its denial of rights, has been interpreted by the Supreme Court of Canada in a restrictive fashion, with the courts holding defenders to a relatively strict standard, depending on the subject-matter of the claim.

The key difference between the Charter and human rights codes is that the former can be used to 'strike down' legislative provisions as unconstitutional. Although governments have a power to "override" judicial decisions (s.32), it has rarely been used; hence, the perception that, since the Charter, power has shifted from parliament to the judiciary. The Charter is, thus, a 'third tier' of rights document, one to which both the federal Human Rights Act and the provincial human rights codes are subject (as

is all legislation). Given that the provisions of these statutes can be found unconstitutional, and that provincial codes do apply to the private sector, the Charter, indirectly, can affect the discriminatory practices of private actors (see Leshner, 1992).²⁰ However, for lesbians and gay men, the Charter has primarily provided an opportunity to challenge heterosexist assumptions in public provision.

Lesbians and gay men, in common with other social movements and 'identities', have focused their energies upon s.15 of the Charter (known as the 'equality section') which came into effect in 1985. Section 15, like the statutory codes, provides protection from discrimination on specified grounds. It also offers a general guarantee of "equality before and under the law", and has, of course, the authority and legitimacy of its constitutionality. The grounds covered by the section are not carved in stone; it is accepted that other bases of discrimination will be identified, and accepted as analogous to those enumerated (known as "analogous grounds"). Although sexual orientation is not a specified ground, it is one such category that has been so accepted. In order to enforce Charter rights, individuals must litigate, and one of the most notable developments in the politics of Canadian social movements has been the creation of 'litigation

²⁰ The Charter can play an important role in re-defining concepts employed in other regulatory regimes, see discussions in Chapters 4, 6.

organisations' to facilitate, through providing funding and litigators, this process (see, for example, Razack, 1991).

Thus, the coming into effect of s.15 of the Charter signalled a new era for lesbian and gay rights litigants. The Charter's role of challenging existing discriminatory legislation, as opposed to the discriminatory actions of employers, landlords and service providers addressed by statutory human rights provision, seemed, to many lesbians and gay men, an ideal way of attacking their exclusion within diverse social benefits schemes. Much, although not all, of the resulting litigation turned on definitions of 'family' or 'spouse' within various federal and provincial statutes.

One of the first such cases was that launched by Karen Andrews, who applied for 'family' health coverage for herself, her partner, and their children under Ontario's Health Insurance Act (Andrews, 1988). The government refused to extend the coverage on the basis that lesbian and gay relationships were excluded from the definition of 'spouse' upon which the coverage depended. Her legal action, which included a Human Rights Code element that was never resolved, asserted that restricting the definition of 'spouse' to heterosexual couples was contrary to several sections in the Charter, including s.15.

The judge in the case, McCrea, set the tone for conservative Charter sexuality jurisprudence generally by, in 1988, denying Andrews' claim on the basis that lesbian and gay couples do not marry and procreate. Restricting benefits to heterosexual couples was justified given governments' important objective of "establishing and maintaining traditional families" (Andrews, 1988:16194). McCrea's authorities were largely drawn from dictionaries, and previous human rights case law described above, such as Vogel (1983).

Since the Andrews decision, a small but growing Charter jurisprudence has now arisen in the area of lesbian and gay equality. In addition to the Mossop case, which, although litigated under the federal human rights statute will have implications for Charter jurisprudence (indeed one could argue the distinction is less and less relevant), several judgments have been rendered under s.15 of the Charter. One of the first was Veysey (1989), in which a federal appeal court found, without much discussion, that sexual orientation was an analogous ground under s.15 and upheld the right of a gay prisoner to claim Charter protection. Interestingly, federal and provincial governments have since accepted this ruling and have chosen not to contest the basic right of lesbians and gay men to make claims under the Charter as a 'disadvantaged group' (see Brown, 1990; Knodel, 1991; Egan, 1991).

The Knodel and Egan decisions, both in 1991, exemplify, along with Mossop, the contradictory development of lesbian and gay rights case law.²¹ In Knodel, the British Columbia trial court found that the "opposite sex" definition of 'spouse' contained in a provincial health statute infringed the sexual orientation protection guaranteed under s.15 of the Charter. Whilst in Egan, a very similar provision was found, by a federal trial court, to be justified under much the same conservative reasoning as that in Andrews, and the older Vogel and North cases.

In a related development, the Ontario Court of Appeal has ruled, in a case about common-law heterosexual partners that may have implications for Mossop, that "unmarried persons living together" do not constitute a "disadvantaged group" as envisioned by s.15 (Leroux, 1991). This would seem to imply that lesbians and gay men, in order to receive s.15 protection, will be forced to claim that protection by invoking the analogous ground of 'sexual orientation' and hence their history of "disadvantage". This would effectively enshrine such claims within a 'minority paradigm' and render more difficult an action which actually sought to challenge, for example, the social legitimacy of marriage.²²

²¹ I consider both these decisions more fully in subsequent chapters; I reiterate that here I am simply trying to provide an overview of case law development.

²² I consider this more fully in Chapter 3.

In another important case, the Ontario Court of Appeal has held that the absence of 'sexual orientation' in the federal Canadian Human Rights Act (the Act under which Mossop is claiming discrimination on grounds of "family status") violates s.15 of the Charter (Haig, 1992). The remedy imposed by the Court was to rule that, henceforth, the CHRA was to be interpreted as though it contained the ground of 'sexual orientation'. Although the ruling in Haig technically applies only in Ontario, the federal government has since announced that it will not appeal the decision. Instead, the Conservative Justice Minister has instructed the Canadian Human Rights Commission to follow the Ontario Court of Appeal's ruling in all relevant adjudications across the country. The Minister has also announced that, as a result, any plans to amend the Act in the parliament will be suspended.

The Haig case manifests both the problems and perils of Charter challenges: on the one hand, the Court allowed the gay litigant to circumvent the route of parliamentary reform. Those who decry the creation of an undemocratic supra-judiciary have little reason to applaud the judgment.²³ On the other hand, for many lesbians and gay

²³ In Chapter 4, I explore the 'politics of rights'. Some of this discussion considers issues to do with the supremacy of parliament, democracy, and judicial power. The 'politics of entrenched constitutions' is, however, not a focus of my research. In Canada, there is a large legal literature concerned with this question, for critical approaches see Bakan (1990, 1991); Glasbeek and Mandel (1984).

men who have been attempting to force the Mulroney Government to amend the CHRA for many years, Haig represents the Charter's promise - the chance to force the government's hand through invoking Charter rights.²⁴

Finally, the Leshner (1992) decision is, as of this writing, the most recent gay rights case to have potentially significant, widespread effects. Here, an Ontario human rights tribunal found that the 'marital status' provision in the Ontario Human Rights Code contravened lesbian and gay equality rights in the Charter, and ordered the provincial government to take steps to ensure the provision of 'spousal' pension benefits to the partners of lesbians and gay men.

New Charter cases continue to be regularly launched, although as public funding sources have been eliminated this is unlikely to continue at such a pace.²⁵ Litigants are challenging discriminatory immigration policies,²⁶ tax provisions,²⁷ and many of the cases noted above are currently under appeal. In the spring of 1992, two gay men

²⁴ The judgment also allows a Conservative minister, sympathetic to lesbian and gay rights (Kim Campbell), to avoid a potentially disastrous confrontation with right-wing backbenchers.

²⁵ See discussion in Chapters 4 and 6.

²⁶ H. Fancott, 'Lesbians and immigration' (February 1992) Kinesis. See also D. McIntosh (1988).

²⁷ 'Lesbian partners recognised as family' (20 March 1992) The Mail-Star and 'No family status for gay couples' (25 March 1992) The Mail-Star.

initiated a Charter-challenge to marriage law.²⁸ Nearly twenty years earlier, Richard North and Chris Vogel (of North and Vogel fame) went to court to force a Winnipeg registry office to enter their 'gay marriage' on its books. Their case was dismissed. Will the 'new era' of lesbian and gay rights jurisprudence offer to 1990s lesbians and gay men the 'marital privileges' which were not proffered in the 1970s?

[5] 'Experts' and 'the law'

Behind this brief history of lesbian and gay rights law reform lies the important role played by 'scientific evidence' in shaping legal constructions of homosexuality; first, as a 'danger' to 'society',²⁹ and then as an unfortunate affliction.³⁰ Within medical discourse, the transition from an approach which feared and pathologised 'the homosexual' to one which advocated empathy and tolerance was an important intervention in legal debates over criminalisation. Within child custody disputes as well, liberal psychology was deployed to show that the children of homosexuals turned out 'normal' (meaning

²⁸ S. Bindman, 'Gay couple go to court to fight for right to marry', (19 May 1992) Toronto Star.

²⁹ See, for example, the discussion of the Klippert case in Kinsman (1987); see also Freedman (1989). Psychiatric constructions of 'dangerousness' have shaped the content of legislation and case law generally, see Menzies (1986).

³⁰ See discussion of liberal psychology in Kitzinger (1987).

heterosexual) and that lesbians and gay men could make 'good parents'.³¹ 'Expert' psychologists scrutinised the 'causes' and 'effects' of homosexuality, testifying as to both its immutability and relative harmlessness. For many lesbians and gay men, this approach represented an advance over previous constructions of homosexuality as 'sick', 'depraved', and 'curable' (see also Vance, 1989).

Nevertheless, psychology, in both its liberal and conservative manifestations, subjected homosexuality to interrogation and classification. The 'psy' professions (Donzelot, 1980), whilst sympathetic to the 'plight' of individual lesbians and gay men, nonetheless studied homosexuality as a 'condition'. Homosexuality's 'opposite' - heterosexuality - remained the closeted, unspoken, norm.

'Psy' constructions played an important role in lesbian and gay law reform struggles; first, by facilitating judicial conservatism (early psychiatric constructions) and then by constituting the homosexual as inherently disadvantaged but deserving of empathy, tolerance, and compassion. Whilst these 'psy' understandings of homosexuality were not dominated by legal 'equality' paradigms, liberal psychology has been relied

³¹ See discussion in Cooper and Herman (1991).

upon by judges and others seeking to extend equality rights to lesbians and gay men (see Chapter 7).³²

Within lesbian and gay rights movements, the transition from criminal and family to human rights law reform has witnessed the entry of a 'new' discipline into the debate - sociology. Whilst sociology has always 'studied' homosexuality (within the 'sociology of deviance'), this branch of the discipline had not played a key role in the development of legal knowledge of homosexuality which had, instead, tended to depend upon the 'psy' constructions. However, contestations over the legal meaning of 'family' have offered new opportunities to other sociologies - particularly, sociology of the family, research in demographic patterns, and various feminist 'expertises' in these and other areas.

A similar transition also occurred within Black civil rights litigation in the United States. As Chesler et al. (1988:21-22) discuss, the landmark school desegregation decision in Brown (1954, 1955) was partly based upon a 'new' liberal psychology that emphasised the psychological harm suffered by Black children. This approach became the new psychological paradigm, supplanting the older, conservative 'victim-blaming' psychology as evidenced in

³² A key enunciator of this form of psychology is Dr. Richard Green; in the United States he has appeared as an expert witness in several gay rights cases. See his article (1988) and Eve Sedgwick's critique (1991). See also Kitzinger (1987), and Chapter 7.

racist decisions such as Plessy (1896). Liberal psychology, for the emerging civil rights movement and its leading law reform organisation the National Association For the Advancement of Colored People, in continuing to pathologise 'Black' and not 'white', was not an ideal anti-racist paradigm. On the other hand, it did represent a movement forward in that it could anchor a programme of positive action.

By the late 1970s, liberal psychology had, within school desegregation litigation, itself been largely replaced (Chesler et al., 1988:24-26). Sociological explanations of structural disadvantage now competed with 'rational choice' models from political science.³³ As Chesler et al. (1988) document, within a twenty-five year period psychology 'experts' had come to play a far less significant role in contributing to the formation of desegregation law.

I would argue that, by the late 1980s, lesbian and gay rights reform had undergone a similar transition. Lesbian and gay campaigners, no longer dependent upon the 'sympathetic pathologies' of liberal psychology, began to offer different paradigms to ground their claims to equality. The Mossop case is one example of this new

³³ The latter arguing, for example, that Black parents 'choose' to live in Black neighbourhoods for entirely 'rational' reasons, and not because of institutional racism.

approach. By invoking the new legitimacy of 'feminist sociology', and rejecting the old paradigms of 'dangerous illness' or 'harmless abnormality', Mossop symbolises the 'new era' of lesbian and gay law reform in Canada. And even where adjudicators dismiss these interventions as 'upstart science', as in Mossop (1990) or Vogel (1992), conservative decision-makers nevertheless now rely upon sociological, rather than psychological, expertise to counter challenges to traditional definitions of 'family', 'spouse', and so on.³⁴

C. Lesbian and Gay Legal Studies

As lesbian and gay rights demands emerged and, in some cases, were met by judges and politicians, a distinctive 'lesbian and gay legal scholarship' also arose. Writers have both developed legal argument in the area, and, more slowly and less visibly, engaged in 'critiques' of rights strategies and politics. By the late 1980s, American law journals had published dozens of articles on the subject, and, gradually, Canadian scholarship has also taken root. In this section, I wish to consider some of this material, both to explain the kinds of approaches that have been taken, and to distinguish my own perspective from these. The predominant form of scholarship has been one which expresses a 'legal positivism', whilst, somewhat in the

³⁴ In the conclusion to Chapter 7 I assess the advantages of the 'sociological paradigm'.

margins of debate, are located several lesbian theorists with a 'separatist' agenda.

[1] Legal Positivism

By 'legal positivism', I am referring to analyses of law and legal strategies that tend to view law itself as neutral, objective, and somehow unconnected to the formation and reproduction of social relations. Rather, positivists are concerned to show how anti-gay judgments are 'irrational' and 'homophobic'; with the 'correct' information inserted into the legal process, lesbian and gay rights will be assured. The positivist approach in Canadian lesbian and gay legal studies is evident from the first forays into the field (eg: Richstone and Russell, 1981). Here, I will focus upon writing produced in the aftermath of the Charter, particularly subsequent to the coming into effect of the 'equality section' (s.15) in 1985. For it is in the Charter's wake that academic approaches to 'gay rights' claims have largely developed.

One of the first to explicitly evoke s.15 in the struggle for lesbian and gay equality was Jim Jefferson (1985), a lawyer active in the gay community. For Jefferson, s.15 was a tool to be used, and one open to accommodating "gay rights". He (1985:70) argued that "homosexuals" shared a "group characteristic" of attraction to the "same sex" and thus were legitimate claimants of

s.15 protection. At no point did he suggest that the experience of lesbians and gay men might vary, or that the implications of particular legal arguments might be different for each. Nor did Jefferson consider how his legal arguments might impact upon other groups or movements struggling for legal equality. For him, law reform, whilst clearly not a solution to discrimination in itself, was a necessary first step and one requiring coming up with the 'right', persuasive argument. The possibility that Charter claims might bring as many problems as benefits was not considered. Others writing within this framework argued that Canadian society was, at its core, a tolerant one; by showing how previous judicial decisions were rooted in aberrant prejudice, rather than sound legal argument, gay equality would be assured (see also Bruner, 1985; Girard, 1986; Green, 1987).

Legal positivism tended to be expounded by male writers with little attention paid to the specificity of lesbian experience. One exception was Wendy Gross' 1986 article on lesbian custody. Gross (1986) reviewed relevant case law in order to argue for an increased use of "scientific evidence" in lesbian custody litigation. In a highly empiricist style, Gross (1986:520-1) marshalled 'expert evidence' to show that the children of lesbian mothers turn out 'normal' - meaning that such children are as likely to be heterosexual as the children of heterosexuals - quoting extensively from psychiatric and

other discourses to 'prove' her case. For Gross (1986:530), "expert testimony" is "absolutely critical" to "educate judges". This is the view taken by Margaret Leopold and Wendy King (1985) as well.

Writers such as Gross, in relying on the sympathetic evidence of 'experts', left unchallenged the legitimacy of these figures to make authoritative pronouncements upon child sexuality. Indeed, her article affirms the power of psychiatry in the lives of lesbian mothers. For Gross, there is 'science' and there is 'prejudice'; lesbian mothers would fare better in the legal system if 'the law' were to reflect the former, rather than the latter. The project of legal rationalism is an empiricist one. In contrast to, for example, a Foucauldian approach that might explore how 'truth' was discursively produced within custody determinations, Gross and others sought to posit a 'better' set of truths upon which to base legal decision-making. Irrational judicial 'bias' was to be replaced by the authoritative tones of the 'psy' professions.

Another article employing the assumptions of legal positivism is one by Bruce Ryder (1990). His purpose was to describe legal discrimination against lesbians and gay men, and then to see if section 15 "can change this situation" - namely, the legal entrenchment of "heterosexual privilege" (1990:44). Like many of the others, Ryder's approach tends to reify law, finding that it has largely "shaped and

defined" family and heterosexuality, and is the "source of oppression" for lesbians and gay men. He 'proves' this by listing, in great detail helpful to future scholars, countless instances where legal provision favours heterosexual couples. Sexuality and its relation to legal regulation is left relatively untheorised, and his analysis is rife with problematic assumptions. For example: that a homogenous 'lesbian and gay movement' is demanding 'equal rights'; that 'sexual orientation' human rights protection does not 'promote' homosexuality; that the hegemony of liberalism in legislative debate indicates a "lack of political power" on the part of lesbians and gay men (52-3); that the category of "race" is an immutable one (67); and that "s.15 has the potential to pose a significant challenge to the legal construction of heterosexual privilege" (57).

Ultimately, Ryder relies on the power of rational legal argument to win the day; he further assumes that legal change leads to social change, and does not appear to consider that the reverse might also be the case. Lesbians and gay men are conceptualised as 'victims' of legal discrimination, rather than as active agents participating in the struggle over legal meaning and interpretation. Ryder's approach is also found in much of the American material. For example, Sexual Orientation and the Law (1989), a book written by the editors of the Harvard Law Review, contains descriptions of legal discrimination

against lesbians and gay men, and proposes several legal arguments which may be made to decision-making forums in order to effect change (see also Mohr, 1988).

The positivist approach does not inquire into the relation between social struggle and law reform, and its assumptions preclude it from understanding the ways in which any form of law is regulation of some kind. These authors wish to exchange the indeterminacies of homophobia with the certainty of correct (or better) knowledge. In doing so, they leave unchallenged the 'politics of truth' (Foucault in Gordon, ed., 1980), the politics of sexuality, and the politics of law reform. At the same time, however, their work is extremely useful to lesbian and gay rights reformers. As I discuss further in Chapter 4, activist reformers often find more value in positivistic contributions than those offered by 'critical scholars'.

[2] Lesbian (legal) separatism

Alongside the scholarship noted above, there has arisen a distinctive 'lesbian' approach to sexuality and law reform. In the United States, for example, Ruthann Robson³⁵ has advocated the creation of a 'lesbian jurisprudence', and has proposed several arguments and strategies that she believes would help lesbians achieve

³⁵ Robson (1990a,b,c,d; 1992) has published several articles and a book outlining her perspective.

legal equality (see also Cain, 1989; Leonard, 1990). For Robson, neither the gay male, nor the feminist movements have managed to provide solutions to specifically lesbian issues. In Canada, Robson's perspective has been endorsed by several writers (see Faulkner, 1991), including Mary Eaton (1991), who has written particularly within the context of human rights reform. I consider her work below as she is one of the few Canadian writers to theorise the relation between lesbian sexuality and human rights reform.

Eaton (1991) takes as her point of departure what she perceives to be the specificity of lesbian experience, as distinct from that of gay men. She argues that lesbians must engage in separate struggles around law reform, and grounds her approach in lesbian separatist theory. Eaton's primary purpose is to explain how human rights responses to homosexuality are rooted in the homophobic construction of gay male sexuality. The law, she argues, focuses its energies constructing the sexuality of gay men as aggressive, predatory, dangerous, and diseased. Historically, this is shown through the ways the criminal law was deployed to regulate sexual activity between men. Eaton (1991) suggests that more recent human rights case law is premised on many of the same assumptions.

Using primarily American jurisprudence (particularly to do with military personnel), Eaton argues that judges have created a "conduct/orientation" distinction; lesbians

and gay men are to be protected from discrimination for "being" homosexuals, but not for specific sexual activities in which they might engage (1991:Chp.4). In judicial practice this has meant, for example, that an openly gay man against whom no allegation of actual sexual conduct has been made, was discriminated against when discharged from the U.S. Army (Watkins, 1989), whilst state sodomy statutes enforced only against male same-sex activity are deemed not discriminatory (Bowers, 1986).

Eaton contends that this "doing/being" distinction is rooted in the legal construction of a dangerous gay male sexuality that must be restrained, and bears no relation to lesbian experience. The interests of lesbians, she argues, are not served by struggling alongside gay men for human rights reforms as they are currently conceived (1991:Chp.5). In the process of being associated with and subsumed under the construction of a gay male sexuality, lesbians are not only rendered legally invisible; they are also denied human rights for reasons that have nothing to do with their actual practice and lives. Eaton thus argues that lesbians must separate themselves from gay men, and develop legal strategies in the interests of lesbians, taking to task legal scholars that have insufficiently theorised lesbian sexuality (1991:13-19).

I take issue with several of Eaton's key points, as I find her perspective ultimately unsatisfying and

potentially problematic. First, I am troubled by Eaton's apparent suggestion that because a homophobic construction of gay male sexuality is the model for legal regulation, that lesbians, as a result, should dissociate themselves from the law reform struggles of gay men. I am not opposed to Eaton's advocacy of a form of lesbian autonomous organising; however, I cannot accept that it should take place for such reasons.

The logic of her position would seem to suggest that any group, when linked to a negative representation of another, should break solidarity with that 'other' and seek change on its own. Whilst it is no doubt necessary for lesbians to insist upon a self-presentation during law reform struggles, and I would agree that this is seldom achieved, it is not, even in Eaton's terms, 'gay men' who are the problem, but how gay male sexuality is legally constructed. Eaton would no doubt agree that this construction is homophobic; however, she seems to be suggesting that this fact alone should propel lesbians to a separate struggle. Would Eaton accept lesbians refusing to associate themselves with anti-racist campaigns because Jews are constructed as having lots of money, or Black people a drug problem? This question may be unfair to Eaton; nevertheless, as I read her work, this seems to be the implication of her argument.

Aside from this point, which in some ways is the key to Eaton's argument, she has, in my view, insufficiently considered the relationship between sexual practice and sexual identity. As others have noted, many of the activities popularly associated with gay male sexuality - for example, washroom sex, and paedophilia - are often engaged in by men who would define themselves as heterosexual. Eaton's main argument rests on an unstated assumption that, somehow, the law's construction of gay male sexuality is 'true' for gay men, but not for lesbians. Whilst she never explicitly says this, she similarly never indicates that gay men may not 'really' be paedophiles, or possess insatiable sexual appetites (see 1991:220). Her concern seems solely to be with explaining that judges hold these views and apply them when considering the extension of lesbian and gay rights. Lesbians, she argues, must invent separate legal strategies.

Eaton's analysis is further complicated by her insistence that the "conduct/orientation" distinction is in imminent danger of being imported into Canada (1991:Chp.4). I cannot agree; there is little evidence to suggest that such an approach has taken or is about to take root in the Canadian context. Eaton herself can find almost no Canadian cases on point, and thus is forced simply to contend that Canadian lesbian and gay rights jurisprudence is about to follow this path. Eaton's argument, to have validity, need not be rooted in the inevitable adoption of

this distinction. Her key point, that lesbian and gay rights must be theorised separately, remains an important one regardless of the "being/doing" distinction. However, her analysis, in my view, in attempting to find a distinctive path for lesbians, results in some confusion.

Indeed, at times, Eaton seems so intent on finding absolutely no shared ground between lesbians and gay men that her review of jurisprudence is somewhat distorted. For example, in discussing custody cases, Eaton focuses on how lesbian mothers are denied the right to be 'political lesbians', and are granted custody on the basis that their sexuality is kept private and hidden. The same is true, however, for gay fathers (see P.B., 1988). In my view, when gay fathers do win custody, it is usually the result of the mother's failure to appear as a 'good mother'; parents are not held to different standards on the basis of their sexuality, but their gender.³⁶ As I discuss further below, the lesbian separatist approach not only severs connections between gay men and lesbians, but also between lesbians and heterosexual women.

Eaton's decision to focus her energies upon the homophobic construction of gay male sexuality and the attendant implications for lesbians means that she fails to explore what, in my view, is a more obvious trend in

³⁶ An interesting case highlighting some of these issues is Robertson v Geisinger (1991). See also Wishard (1989).

Canadian lesbian and gay rights jurisprudence - the deployment of liberal ideologies to support lesbian and gay human rights demands. In several places, Eaton's analysis indicates that lesbian and gay rights cases have largely been lost in Canada. Whilst I agree that a simple 'results tally' might once have suggested this, I believe she ignores the myriad of complex ways in which meanings change, movements organise, and the balance of power shifts.

As I go on to explore in following chapters, lesbian and gay rights campaigns, on a variety of fronts, have been enormously successful, despite the 'loss' of specific battles. Furthermore, Eaton's virtual obsession with gay men and the "being/doing" distinction in American law unfortunately renders it impossible for her to consider the hegemony of liberalism within Canadian lesbian and gay legal struggle. Much of my thesis is, therefore, an attempt to come to grips with this dimension.

My research thus takes a quite different turn from both legal positivism and lesbian separatism. I am not concerned with drawing out 'essential' differences between gay and lesbian practice in order to argue for legal strategies suited to lesbian experience, but in exploring the ways in which social movements engage in legal struggle, particularly the diverse and contradictory effects of such engagements. The values underlying my

project are not those of separation but solidarity, and my intention is to argue for an analysis which links lesbian and gay oppression to wider sets of social relations, rather than to write "for lesbians only".³⁷

Finally, in responding to Mary Eaton's concerns, it may be worth here considering a point made by Judith Butler (1991), writing in a somewhat different context. She has observed, as have many others, that in public discourses, 'the lesbian' has been notably absent. Whilst sex between men was certainly given an entirely negative construction, at least male homosexuality was present in public debate, law, and other discourses. This, Butler argues, has offered to gay men a site from which to resist.

To be prohibited explicitly is to occupy a discursive site from which something like a reverse-discourse can be articulated; to be implicitly proscribed is not even to qualify as an object of prohibition...It is one thing to be erased by discourse, and yet another to be present in discourse as an abiding falsehood (Butler, 1991:20).

Human rights laws, perhaps, offer to lesbians the opportunity to articulate a form of resistance. In debating our inclusion within this 'gender neutral' form of law, in contesting the paradigms of sexuality deployed to gain 'our rights', lesbians are perhaps able to participate in public sexuality debates as never before. Indeed, the work of Ruthann Robson, Mary Eaton, and others, as well as that contained in the pages which follow, attest to this.

³⁷ This is the title of a lesbian separatist anthology, see Hoagland and Penelope (1988).

CHAPTER 3

I HAVE NO IDEA AND FRANKLY I DO NOT CARE:¹
LIBERALISM'S HEGEMONY IN THE STRUGGLE FOR A
SEXUAL ORIENTATION AMENDMENT TO ONTARIO'S
HUMAN RIGHTS CODE, 1986

In Chapter 2 I argued that as lesbian and gay identities emerged and consolidated the demand for and acquisition of rights were seen by many to be an intrinsic aspect of lesbian and gay liberation. Underlying many of such demands was a desire on the part of these "new subjects" to be "coded human" (Ross, 1990), to be 'identified' as social citizens; inclusion within existing systems of state-based rights and status thus became a key demand. Two questions can follow from this. How was 'lesbian and gay equality' constructed within this field of law? And, what are the implications of striving for inclusion within liberal equality structures? I respond to these questions by exploring the 'politics of Bill 7' - the struggle, in 1986, to add a 'sexual orientation' ground to Ontario's Human Rights Code. I first outline the events of Bill 7, and consider some of the reasons for its successful passage. I then go on to examine the politics underlying the struggle.

¹ From legislative speech of Bob Rae, MPP, Ontario Hansard, 2 December 1986, 3851.

In short, my argument is that, in this specific struggle, a 'liberal equality' paradigm was hegemonic. In other words, that public debate on the sexual orientation amendment was structured around this paradigm, and that liberal legal ideology achieved an authoritative dominance that both excluded or marginalised other perspectives from debate, and produced a consensus within which lesbian and gay equality was to be defined and permitted. I consider some of the contradictions within this ideology, including the ways in which human rights law was simultaneously articulated as significant and of little practical effect.

I also explore how human rights law, particularly the 'minority rights paradigm', constructs homo- and hetero-sexualities, and consider the extent to which, for lesbian and gay organisations, legal strategies are pragmatic, and do not necessarily indicate a 'buying into' of dominant values and ideologies.

A. The Campaign For Bill 7

The original text of Bill 7, introduced into the Ontario legislature for first reading in 1985, contained no mention of sexual orientation. The Bill was an omnibus statute, amending a series of other pieces of legislation, in order to render Ontario law compatible with the newly effective equality provision of the Charter of Rights and Freedoms, section 15.² This process of 'Charter review' was

² For description of the Charter see Chapter 2.

taking place across the country's provincial legislatures. In Ontario, one of the many statutes scheduled for minor amendment was the Human Rights Code.

Significantly, the provincial government at this time was a minority one, the 'left-leaning' New Democratic Party (NDP) holding the balance of power while the Liberal Party (LP) formed the government. At the start of 1986, Bill 7 moved to the legislature's Justice Committee. A number of amendments were tabled there, including one to add sexual orientation to the list of grounds upon which discrimination was prohibited. The amendment was proposed by Evelyn Gigantes, the NDP Justice critic.³

The somewhat unexpected introduction of the Gigantes amendment prompted a measure of activity from lesbian and gay organisations. Two figured prominently, the Coalition For Gay Rights in Ontario (CGRO), as in earlier campaigns, as well as the Right to Privacy Committee, a group of gay men predominantly active around criminal code and policing issues.⁴ The organisations quickly produced briefs, and initiated low-key lobbying efforts. The firm NDP commitment coupled with that party's new legislative power encouraged some hopes amongst activists; however, CGRO did

³ The previous autumn, Gigantes had introduced an unsuccessful Private Member's Bill to achieve the same purpose.

⁴ My focus is upon CGRO. For a discussion of the RTPC (not re Bill 7) see, for example, McCaskell (1988).

not expect the amendment to attract Liberal Party support on the Committee.⁵

There is little evidence that the amendment caused much controversy at the Committee stage. Whilst the Liberals did not adopt the amendment as their own, Ian Scott, Attorney-General at the time, was sympathetic, and his and other Liberal votes were cast in favour when the Justice Committee voted in May. Two Conservative members also approved, with two others casting negative votes. David Rayside (1988:114) suggests the amendment was not taken particularly seriously, few legislators believed it would reach final reading, and also that other business assumed priority at the time. However, at least one prominent Cabinet member publicly expressed his opinion that the amendment would pass the legislature.⁶ Up to this point, the amendment's progress had been smooth, with little conflict, and without a perceived need for mass mobilisation in its support.⁷

⁵ Coalition For Gay Rights in Ontario, CGRO Brief Support Group, Minutes, .23 April 1986, Gay Archives of Canada.

⁶ See comments of Attorney-General Ian Scott, Canadian Press, 6 May 1986.

⁷ David Rayside (1988) an academic active in CGRO at the time seems to suggest that CGRO deliberately chose to conduct a quiet, non-confrontational campaign, and did not actively seek to mobilise lesbian and gay communities around the amendment. Chris Bearchell, another Bill 7 CGRO activist, disagrees, and argues that large numbers of lesbians and gay men were mobilised by CGRO across the province (interview). I discuss this further below.

It was, in some respects, the decision of the New Christian Right⁸ in Ontario to make Bill 7 a rallying point for themselves that led CGRO and others to initiate a full-scale pro-amendment campaign. The anti-amendment lobby was headed by the Coalition for Family Values (CFV), an organisation founded the year before in response to a positive federal parliamentary recommendation on sexual orientation.⁹ Its core members were Protestant churches (particularly Pentecostals); in addition, other less visibly Christian organisations, such as REAL Women and the National Citizens Coalition, also participated.¹⁰ The CFV was further strengthened during the Bill 7 episode by the addition of the Ontario Conference of Catholic Bishops.

By the autumn of 1986, the CFV campaign had gathered considerable momentum as the Bill headed back to the legislature for second reading. The Christian coalition had launched a massive letter-writing and phone campaign,

⁸ See Chapters 5 and 6 for full consideration of this movement.

⁹ In 1985, a federal all-party committee had recommended the inclusion of sexual orientation in the Canadian Human Rights Act, and had agreed that s.15 of the Charter protected lesbians and gay men by way of analogy. See Equality For All, Report of the Federal Equality Committee, 1985.

¹⁰ REAL Women, formed in 1984, is dedicated to overturning what they perceive to be the successful 'anti-woman' initiatives of the Canadian women's movement. More recently, they have focused much energy upon fighting 'gay rights', see Ross (1988). The National Citizens Coalition is a neo-conservative lobby group, backed by wealthy individuals and corporations. REAL Women is further discussed in Chapters 5 and 6.

prepared briefs, and courted public opinion, relying upon materials prepared for a previous federal debate which characterised homosexuals as perverted, predatory, paedophiles.¹¹ However, the formal briefs submitted to politicians tended to avoid such evocations in favour of dry, legal argumentation.¹²

Towards the end of October, the amendment struggle had become highly-charged and publicly visible. Both sides intensified their campaigns as the amendment appeared to be splitting the Liberal Party, with rural MPPs coming under intense pressure as a result of the anti-amendment campaign.¹³ As the government began to delay and equivocate, lesbian and gay activists became increasingly concerned. Both CGRO and the Right to Privacy Committee decided to prioritise their own letter-writing and phone campaigns, as well as to plan a major public rally. The latter, held at Toronto's St. Lawrence Market Hall on 20 November, attracted nearly 1500 people. MPPs from all

¹¹ For example, the REAL Women 'sexual orientation' pamphlet, discussed further in Chapter 5, was widely distributed. See also Coalition For Family Values, Open Letter to Fellow Ontarians from Rev. Hilsden, 4 October 1986, Gay Archives of Canada.

¹² See, for example, Brief of the Evangelical Fellowship of Canada of Canada on Homosexual Legislation: An Evangelical Response', July, 1986, Gay Archives of Canada. See Chapter 6 for a consideration of the process whereby conservative Christian beliefs are translated into legal language.

¹³ See, for example, S. Oziewicz, 'Ontario Liberals divided over homosexual rights legislation' (18 October 1986) Globe and Mail.

three parties spoke, as did representatives from the labour and women's movements, and others such as writer Margaret Atwood. This rally reflected not only CGRO's attempts to mobilise lesbians and gay men, but also the strategies of coalition-building and the recruitment of popular celebrities.¹⁴ As the pro-campaign intensified, Premier David Peterson declared his support at a Liberal Party caucus meeting on 18 November (Rayside, 1988:119). Although the Premier formally indicated his intention to permit a free vote, most Liberal MPPs perceived a soft whip to be cracking.¹⁵

By this time, the media had 'discovered' the issue. Whilst media interest peaked with the start of legislative debate on 25 November, a number of stories, depicting the conflict between pro and anti-amendment forces, appeared beforehand.¹⁶ Indeed, the two major newspapers both felt

¹⁴ Endorsements were also sought and obtained from a variety of organisations including: the Ontario Federation of Labour, the Canadian Auto Worker's Union, the Ontario Secondary School Teacher's Federation, the National Action Committee on the Status of Women, the Women's Legal Education and Action Fund, and the United Church of Canada.

¹⁵ The personal support of Liberal Whip Joan Smith is evident from CGRO documents. She was in regular contact with CGRO, and, together with Scott and Peterson, was instrumental in ensuring the amendment's passage. See, CGRO, Steering Committee Meeting, 20-21 September 1986, Appendix 16, Spokesperson's Report re Bill 7, Gay Archives of Canada.

¹⁶ See, for example, J. McLeod, 'Bill banning anti-gay bias "powder keg"' (10 October 1986) Toronto Sun; P. Comeau, 'Gay rights bill tests Grit will', Toronto Sun (5 November 1986); C. Cornacchia, 'Planned bill to protect gays is in trouble, churchman says' Globe and Mail (3 November 1986).

the issue sufficiently significant to devote editorials indicating their endorsement of the amendment. The Globe and Mail, for example, using the language of "equality" and "dignity", argued in the amendment's favour on 19 November.¹⁷

With the start of legislative debate, the struggle intensified. Despite both movements sensing by now that the amendment was likely to win approval, the political battle continued, primarily through the media. The content of MPP's speeches was carried in detail on the front pages of the press for days.¹⁸ Supporters of both lobbies attended the debates, cheering or heckling speakers on all sides, the conduct of legislative observers becoming as much a focus of press interest as the debate itself. On 2 December, after days of controversial and emotional speeches, the amendment passed. The entire Bill itself became law two weeks later.¹⁹ Having described the course of events, I now wish to explore some of the reasons explaining Bill 7's success.

David Rayside (1988) has carefully considered the question of why Bill 7 passed when so many other sexual

¹⁷ 'Rights and Sexuality' (19 November 1986) Globe and Mail. See also, 'Of homosexuals and discrimination' (15 November 1986) Toronto Star.

¹⁸ See, for example, S. Oziwicz, 'Tory MPPs assail bill banning homosexual bias' (27 November 1986) Globe and Mail.

¹⁹ Equality Rights Statute Law Amendment Act, 1986, S.O. 1986, c.64. Some provisions relating to disability were declared not yet in force at that time.

orientation amendments had failed.²⁰ He has identified a number of factors influencing the Bill's outcome. One of these is the history of lesbian and gay organising in Ontario (including, but not limited to, past Human Rights Code struggles) which politicised people within and without lesbian and gay communities, and created organisations with resources that could be drawn upon when necessary. The importance of social movements creating formal, bureaucratic structures has also been emphasised by other writers (see Jenkins and Eckert, 1986; Simon, 1982; Staggenborg, 1988).²¹

In addition, Rayside (1988) suggests that the lobbying tactics of the lesbian and gay organisations, including a "calmness of style" and "low key argumentation" (partially orchestrated by Rayside himself, an active CGRO member at the time), were responsible for the pro-Bill forces being well-received by politicians. These tactics included the decision not to hold demonstrations or marches in order not to alienate Liberal MPPs (1988:127).²² He further argues that the 'dirty' campaign waged by the Coalition For Family Values backfired by offending liberal sensitivities. As I

²⁰ For a review of this history see Chapter 2.

²¹ Piven and Cloward (1977) argue formal structures are de-politicising, although other research suggests this is not an 'iron' rule. See also Morris (1984).

²² It is worth noting, again, that Chris Bearchell's assessment of the campaign is rather different (interview).

discuss in Chapters 4 and 6, this does appear to have been the case.

Rayside's views here presume a kind of liberal consensus with respect to ending discrimination against lesbians and gay men. According to him, survey data showed a liberalising shift in Canadian attitudes towards homosexuality. A 1985 Gallop poll, for example, revealed 70% in favour of extending human rights codes protections to lesbians and gay men (Rayside, 1988:129). Rayside further suggests that this trend had been reflected in the media (as the largely positive editorial response during Bill 7 would seem to show). Arguably, the institutionalisation of formal anti-discrimination measures for other groups was perceived by many liberals as needing extension to the category of 'sexual orientation'. Elsewhere, Rayside and Bowler (1988) have shown in more detail how this liberalising trend occurred along-side a concurrently-held view that homosexuality itself was 'morally wrong'. Thus, Canadian heterosexuals were formally committed to the equal treatment of lesbians and gay men, whilst believing firmly (and equally) in the abnormality and wrongness of homosexual expressions. I consider this apparent contradiction more closely in Chapter 4.

Another factor noted by Rayside (1988) was the existence of an opportune political moment. The

combination of minority government, NDP support, federal developments, and so on, all contributed to the amendment's success this time around. Finally, and, from Rayside's perspective perhaps most importantly, internal party bureaucracies contained important amendment supporters. The unequivocal support of the NDP, particularly the determination of feminist MPP Gigantes, backed by the Party's gay caucus, forced the Liberals to respond. And it was the coming-on-board of the two most prominent Liberal Cabinet members, Premier Peterson and Attorney-General Scott, that ensured the amendment's passage (Rayside, 1988:135-7). Rayside suggests the amendment's appeal to such persons lay in how it was framed ideologically; as a "minority rights issue, lodged within classic liberal-democratic principles" (Rayside, 1988:132). I agree, but, as I go on to discuss, this is not unproblematic.

Whilst I largely concur with Rayside's assessment, I will return to problematise some of his points in this and the following chapters. For the moment, I wish to add one further factor responsible, in part, for Bill 7's success. By 1986, the impact of the Charter on Canadian culture had begun to be felt. Whilst legal cases under the equality provision (s.15) had only started to filter through lower courts, the increased power, prestige, and authority of the

Supreme Court of Canada had been demonstrated in a series of decisions under other sections.²³

The process Mandel and Glasbeek (1984) have termed "the legalisation of politics" did not originate with the Charter.²⁴ I indicated in Chapter 2 that, from a much earlier period, lesbian and gay rights movements sought to achieve social change through legal rights reform. Nevertheless, the Charter's enactment signalled the increasing pre-eminence of a public discourse of individual rights and liberties. 'Charter-challenge' became a new catch-phrase, entering the politics of everyday life.²⁵ Indeed, it was the desire to ensure that the Code's provisions did not conflict with Charter guarantees that had prompted the introduction of Bill 7 in the first place, and, hence the opportunity for Gigantes to present her amendment. Whilst there is no way of measuring the effects of the Charter's advent upon popular consciousness, there

²³ See, for example, Hunter (1984); Big M Drug Mart (1985); Morin (1985); Singh (1985); Edwards Books (1986); Oakes (1986).

²⁴ Mandel and Glasbeek (1984) argue that the Charter has fostered a de-politicisation of social struggle through the reification of abstract rights. See also, Mandel (1989); Glasbeek (1989a); Fudge and Glasbeek (1992). I discuss these ideas further in Chapter 4.

²⁵ In keeping with these developments, the Supreme Court of Canada endorsed, during this period, a "living tree" approach to interpreting human rights code legislation, which, the judges pronounced, was a 'special case' of law standing above other regulatory regimes. See, for example, O'Malley (1985); Bhinder (1985); subsequent decisions reiterated this approach, Action Travail (1987); Robichaud (1987).

can be little doubt that 'rights', as goal and rhetoric, entered Canadian political struggle as never before. This influenced, I would suggest, not only the shift in public opinion documented by Rayside and Bowler (1988), but also the potential for the introduction and success of initiatives like the Bill 7 amendment.

Thus, a number of factors were involved in the eventual success of the Ontario amendment campaign, including: the fourteen years of effort spent creating a more receptive social climate; the growing strength and sophistication of the law reform movement; the increased visibility, vitality, and activism of lesbian and gay communities generally; and, last but not least, the advent of the Charter and the increasing prominence, authority, and significance of human rights paradigms in public debate throughout the country. I now wish to explore these developments at a somewhat deeper level.

B. The Politics of Liberal Equality

The process of interaction between pre-existing legal frameworks and social movement identity politics is complex. The Human Rights Code regime for guaranteeing rights and resolving conflicts is one based on a view of society as containing a variety of diverse minority-like populations, each of which suffers a kind of antiquated prejudice no longer tolerable in liberal democracies. The

Code's Preamble speaks of "the inherent dignity and the equal and inalienable rights of all members of the human family"; it is Ontario "public policy" to create "a climate of understanding and mutual respect".

The legislation attempts to resolve 'social problems', for example racism and sexism, through encoding individuals as discrete categories, whose difficulties can be alleviated through providing "freedom from discrimination" on specified grounds: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status²⁶ and handicap. The goals of the Preamble are presumably facilitated by providing a "right to equal treatment" and a "right to freedom from harassment" with respect to goods and services, housing, employment, and membership in professional associations (ss. 1; 2; 4; 5). This, then, was one of the legal frameworks the Canadian lesbian and gay movement confronted as it grew and began to express demands beyond the repeal of criminal code sanctions. However, the choice to struggle for inclusion in these regimes necessitated a self-definition compatible with pre-existing concepts.

The model currently hegemonic within human rights-type struggles is one of a homogenous minority population.

²⁶ This ground features in the Mossop litigation where federal human rights legislation contained no 'sexual orientation' provision.

As applied to sexuality, the model represents society as having always contained a majority of heterosexuals, and a minority of homosexuals. Often, this is made explicit through reliance on the concept of immutability - that sexual orientation is fixed genetically or in early childhood, only waiting to be discovered. There have always been and will always be those who sexually prefer their own sex. This preference, occurring without any conscious agency on the part of the individual, should not, liberal argument goes, be a basis for discrimination (see Cooper and Herman, 1991). When liberals acknowledge biology may not be factor, they analogise sexual orientation with religious orientation - as a deep-seated, fundamental aspect of identity that cannot be changed except at great cost (if at all).

Liberal legalism, upon which human rights laws are premised, thus assumes a series of Truths: society is pluralistic, there are majorities and minorities, true democracy necessitates the protection of minorities from the tyranny of majorities, and true minorities share characteristics that differentiate them from the majority 'norm'. The majority must exhibit qualities of tolerance, understanding, and compassion, ultimately evidenced by their willingness to extend legal protection to identified minorities. Even in periods when anti-discrimination laws are rolled back, as in the United States in the 1980s, and

'real' incidents of abuse escalate, this ideology continues to dominate. Even neoconservative politicians have tended to pay it at least lip-service.²⁷

However, the minority model is problematic when applied to any group of people; in relation to lesbians and gay men it seems particularly inappropriate. If, as many feminists and others contend, sexuality is socially constructed, and there is no necessary or 'natural' link between reproductive capacities, gender categories, and sexual desire, then representing lesbians and gay men as an immutable minority may restrict rather than broaden our understandings of sexuality. Lesbians and gay men are granted legitimacy, not on the basis that there might be something problematic with gender roles and sexual hierarchies, but on the basis that they constitute a fixed group of 'others' who need and deserve protection.²⁸ Human rights frameworks thus pull in 'new' identities thereby regulating them, and containing their challenge to dominant social relations.²⁹

²⁷ Witness George Bush's struggle around the 1990 Civil Rights Act in the United States.

²⁸ See also Carole Vance's (1989) discussion of the relationship between lesbian and gay movements and notions of immutability. The relevance or appropriateness of the concept 'minority' to lesbian and gay identity is an historical debate within the movement - see, for example, Weeks (1985:95-201) and Kinsman (1987:90-3) for different views. Here, I am focusing upon how human rights law compels its adoption, despite this debate. See Chapter 8 for further discussion.

²⁹ I continue this point in the conclusion to this chapter.

Another consequence of the human rights strategy is that it tends to entrench the liberal 'public/private' divide by locating the source of lesbian and gay oppression in the public spheres of employment, housing, and service provision addressed by the Code. The CGRO Bill 7 brief represents the areas of employment and housing provision as key sites of discrimination (as they must be in order to publicly justify a sexual orientation amendment to legislation that only applies in a limited realm).³⁰ Interestingly, the CGRO Brief also lists child custody as one of the areas where discrimination against lesbians and gay men occurs (p.16); however, Ontario's Human Rights Code has no jurisdiction over the expression of judicial homophobia in custody judgments.³¹

Judy Fudge (1989) has contended, in the context of women's rights, that too much attention paid to achieving inclusion within laws which re-enforce the public/private divide may in fact further obscure 'private sphere' relations, a key site of women's oppression. Feminists who critically analyse notions of political citizenship make a similar point (see, for example, Pateman, 1989). I would

³⁰ See Discrimination Against Lesbians and Gay Men: The Ontario Human Rights Omission, A Brief to the Ontario Legislature, Coalition For Gay Rights in Ontario, October 1986.

³¹ This was a point stressed by Ontario Attorney-General Ian Scott in the aftermath of the amendment's passage.

extend this analysis and argue that, in the context of sexuality struggles, a focus on 'public sphere' discrimination leaves unsaid and therefore unaddressed one of the primary sites of the construction and enforcement of heterosexuality - home and family relations.³²

Another drawback to the liberal equality paradigm is how it serves to obfuscate divisions within social movements, perhaps marginalising important political issues in the process. In the Bill 7 campaign, CGRO presented the heterosexual public with a homogenous whole, a group of women and men self-defined as lesbian and gay, who suffered the same discrimination. There was no question that both lesbians and gay men deserved the same protections. Ironically, with the exception of organisations like CGRO, few gay men and lesbians actually worked together,³³ and political battles raged often between them. Liberal equality discourse not only minimises divisions within the 'minority', it also renders it nearly impossible for linkages to be made between individuals different 'minority' memberships - each is seen to be discrete, and capable of individual resolution (see Crenshaw, 1989). In the case of the so-called 'lesbian and gay minority', this

³² However, one could also argue that the legitimacy of lesbian and gay equality in the 'public sphere' has long-term effects on 'private' relations; for example, by contributing to the production of a 'new' consciousness on the part of parents.

³³ The more recent advent of AIDS and Queer Nation activism has shifted this somewhat.

has the effect of ensuring that lesbians' experience as 'women', 'Jewish', 'Black', and so on is submerged.

Yet, on the other hand, it was, according to David Rayside (1988:127), it was CGRO's expression of just such liberal principles that facilitated mainstream politicians' support in the Bill 7 process. The principles of liberal equality were clearly appealed to in the CGRO brief to MPPs. The introduction refers a number of times to the Charter and the values it is perceived to represent.³⁴ Citing a paper prepared by Ian Scott, then Ontario Attorney-General, CGRO outlines the factors that might make a group of people a legitimate "analogous ground" under the Charter, namely that the group: has received human rights protection elsewhere, is subject to a pattern of discrimination (the main subject of the brief), and is not economically based.³⁵ CGRO also borrows two further factors.

That the major characteristic defining the group not be easily changeable by the individual - recent medical and psychological research concludes overwhelmingly that it is not easy to change one's homosexual orientation.

That the group be a discrete and cohesive class - though not all its members are necessarily visible, the lesbian and gay community has a well established group identity distinguishable in

³⁴ Discrimination Against Lesbians and Gay Men: The Ontario Human Rights Omission, A brief to the Ontario Legislature, Coalition For Gay Rights in Ontario, October, 1986, p.5.

³⁵ This last factor is often noted by marxist Charter critics who argue that the Charter functions as an instrument of class rule.

part by networks of friends, an alternative social-service support system, and shared social, cultural, commercial and political activities.³⁶

Here, the brief explicitly presents a homogenous, immutable minority.

Elsewhere, the brief advocates a "right to abstain from or indulge in sexual practices as long as it violates no one's rights" (p.7), and continues,

Most Canadians appreciate the difference between acceptance and tolerance - and most are prepared to be tolerant. Citizens of our country tend to believe that all people, even those whose views and practices they cannot accept, should be treated equally by the law. The law should not try to force acceptance, but it should enshrine tolerance....We are convinced that people's experiences can change their prejudiced attitudes; tolerance is often transformed into acceptance by the realisation that a person one is close to belongs to a denigrated minority. We need the minimal protection afforded by inclusion in the Code in order to be able to share our lives more honestly and to show homophobic people that their beliefs about us are not true.³⁷

In addition, then, to presenting lesbians and gay men as a fixed group with a shared identity, CGRO also explicitly expressed elements of liberal ideology, in its appeal to the values discussed earlier.

During the legislative debate on the amendment, liberal and social democratic MPPs took up these themes of pluralism, tolerance, and society's commitment to fighting discrimination against minorities. Ian Scott, in

³⁶ Ibid.

³⁷ Ibid., p.8.

introducing the amendment and being the first to speak on its behalf, argued that no one should be deprived of services or discriminated against as a result of their membership of a "class".³⁸ People, he went on, should be considered on their "merit" and "willingness to obey the law".³⁹ Society, Scott argued, was "pluralistic", and opinions as to the morality of certain behaviours were a private and "personal" matter.⁴⁰ He urged his fellow MPPs to consider "how we have honoured the human rights of our fellow citizens".⁴¹

Themes of tolerance and pluralism were echoed by many who spoke in the amendment's defense. Robert Nixon, Liberal House leader and veteran of over thirty years in the Ontario legislature, spoke of government's duty to enshrine and extend human rights for all citizens, and to eliminate "prejudice" in all its forms.⁴² In a speech detailing various incidents of discrimination he had observed, David Reville, NDP MPP, eloquently urged the legislature to exhibit "tolerance" and moral fortitude.⁴³ Liberals Caplan, Wrye, and Peterson, and Conservatives

³⁸ Hansard, 25 November, 3620.

³⁹ Ibid.

⁴⁰ Ibid., 3623. See also Johnstone, Ontario Hansard, 26 November 1986, 3670.

⁴¹ Ibid., 3622.

⁴² Ontario Hansard, 26 November 1986, 3690-3691.

⁴³ Ontario Hansard, 1 December 1986, 3788-90.

Fish, Gillies, and Grossman, all echoed these sentiments, extolling the virtues of a Canadian society committed to ending the persecution of minorities.⁴⁴

Interestingly, Bob Rae, the social democratic leader of the Ontario NDP (and provincial premier following the 1990 election), offered the fullest amendment defense based on liberal ideology. His speech brings together ideas of tolerance, rights, harm, privacy, and pluralism and typifies the liberal approach.

We start with the affirmation that it is a question of rights...rights are not given by the state. Rights are not delivered to individuals as a matter of utilitarian convenience. Rights are not given; they are recognised in law because they are innate to what it means to be human...I speak as a democratic socialist and as someone for whom liberty is a fundamental value...

...the other value which I think we are attempting to affirm in this amendment is a value to which I ascribe a great deal of importance, and that is the value of privacy. I have literally no idea whether the vast majority of the people with whom I deal day to day are gay or not. I have no idea and frankly I do not care, because I do not think it is any of my business in the work that I do as a legislator. It is not relevant...

We are a pluralist society...the purpose of law is not the expression of private outrage but rather the expression of public tolerance.⁴⁵

Provincial legislators varied in the extent to which these values were viewed as already dominant in society, or in

⁴⁴ See, respectively, Ontario Hansard: 1 December 1986, 3790; 2 December 1986, 3838; 2 December 1986, 3856; 1 December 1986, 3805; 2 December 1986, 3842; 2 December 1986, 3853.

⁴⁵ Ontario Hansard, 2 December 1986, 3850-3852.

the necessary process of being extended. Their common position was that the appropriate role of government was to foster these principles, and that, indeed, a consensus existed as to this being desirable. Further, there was an assumption that government, through its legislative powers, had the ability to create a society where everyone was truly treated 'equally'.

Few of those who spoke in the amendment's favour chose to explicitly discuss sexuality. Indeed, their emphasis on 'privacy' precluded this. Those who did venture into discussions as to the 'causes' of homosexuality tended to hold views relying upon its genetic origins.⁴⁶ This contrasted sharply with the speeches of those who spoke against the amendment. Whilst I consider how the moral right construct sexuality more fully in Chapter 5, the Bill 7 episode reveals the extent to which liberal ideology abandons discussions of sexuality to the right. Twenty-six MPPs spoke against the amendment, and, often using rhetoric taken directly from CFV materials, almost every one offered their views as to what homosexuality 'was', and what purpose heterosexuality and 'the family' served in

⁴⁶ Susan Fish, one of four sympathetic Tory MPPs to vote in favour, did so explicitly, Ontario Hansard, 1 December 1986, 3806-7. Liberal MPP Caplan, for example, referred a number of times to lesbians and gay men as a "class of persons", Ontario Hansard, 1 December 1986, 3790. Another Liberal, describing himself as a "psychiatrist and amateur social political philosopher" spoke of his dilemma re attempting to resolve the question of 'homosexual causation', Henderson, Ontario Hansard, 26 November 1986, 3676.

society.⁴⁷ Many of these politicians expressed the view that homosexuality was a choice that threatened societal stability.⁴⁸

One voice did attempt to inject a feminist analysis into the debate. Evelyn Gigantes, the MPP responsible for the amendment, responded in her speech to right-wing rhetoric by arguing that heterosexual men were largely responsible for the abuse of children, linking the right's obsession with gay paedophilia to the privileging of boys' experiences over the sexual abuse of many more girls by heterosexual men.⁴⁹ She described right-wing Bill 7 propaganda as "semi-pornographic" and exposed the contradiction embodied in the view that heterosexuality is simultaneously 'natural' and 'threatened'.⁵⁰ Gigantes also explicitly addressed the sources of homophobia.

I feel deeply offended by the understanding that some men will organise in religious and business groups to say that men who are not like them are traitors to a system where sex is a rightful means of oppression. Some of those men are hypocrites. Some are not telling the truth. Some know they are not heterosexual. Some of

⁴⁷ See, for example: McKessock, Ontario Hansard, 25 November 1986, 3629; Bernier, Ibid., 3634; Haggerty, Ibid., 3639; Runciman, Ibid., 3673; Hennessy, Ibid., 3678; Villeneuve, Ibid., 26 November 1986, 3682; Gregory, Ibid., 27 November 1986, 3738; Marland, Ibid., 3743; Sheppard, Ibid., 3748; Pope, Ibid., 1 December 1986, 3786; McCague, Ibid., 3782; Wiseman, Ibid., 3797; Leluk, Ibid., 2 December 1986, 3835.

⁴⁸ See particularly: Gregory; Marland; McCague; Leluk, Ibid.

⁴⁹ Ontario Hansard, 25 November 1986, 3626-27.

⁵⁰ Ibid., 3627.

those women are strangers to what is best in the female sex, directness and honesty.

There are 125 elected representatives in the Ontario Legislature: 10 are women. If the sexual numbers and the social power were reversed, I believe the clauses of section 18 relating to sexual orientation might not even be necessary. Women do not feel threatened by homosexual people, male or female. It is the maleness of economic and social domination of our society that is threatened by this reform; not the womanness or the childness, but the maleness that so profits by its domination through being male.

...it is my humble opinion that the hatred and victimisation of homosexual people is part of a male-dominated system, dealing with men who do not join as if they were traitors. There is no task that I have undertaken that has made me feel more radical than this one.⁵¹

Gigantes' speech is remarkable, not only for its content, but for the fact that there was no other speech like it, and, indeed, no other similar contribution from any amendment campaigners.

For the most part, the CGRO brief and the speeches of supportive MPPs shared a common language and ideology - legal liberalism. However, parliamentary briefs and legislative debates are rather elite forums. Whilst the galleries tended to be full during the Bill 7 debate, most Ontarians would have read about the speeches in their daily newspaper. How were the ideas discussed above translated into media copy?

Whilst I do not intend a comprehensive 'press analysis' of this struggle, I do wish to briefly consider

⁵¹ Ibid., 3629.

the question of how the Bill 7 struggle was represented in the mainstream media, particularly in the three major Toronto-based newspapers. As I have suggested, whilst there was some coverage of the amendment prior to its discussion in the House, the press did not become fully interested in the amendment until the 'anti' campaign intensified and legislative debate began. Major newspapers thus became participants in the Bill's interpretation at the height of its controversy. In this respect, one could argue that the press was quickly compelled to 'take sides', and this is, indeed, what happened. By the end of November, the Toronto Star and the Globe and Mail were identified as being amendment supporters. The Star's coverage was the most explicitly in favour of the Bill;⁵² whilst the Globe's reporters were somewhat more neutral, their paper's editorial board was not.⁵³ The Toronto Sun, in keeping with its reactionary, populist stance, came out against the amendment.⁵⁴

⁵² See particularly the columns of Rosemary Spiers: 'Beware! Propaganda at work' (29 November 1986) Toronto Star; 'Grossman shows he's is no captive leader' (3 December 1986) Toronto Star; 'Thou shalt not defame others' (6 December 1986) Toronto Star. Also, editorial 'Conscience prevails' (3 December 1986) Toronto Star, and previous editorial endorsing amendment, 'Of homosexuals and discrimination' (15 November 1986) Toronto Star.

⁵³ See 'Rights and Sexuality' (19 November 1986) Globe and Mail. Also, opinion column by O. French, 'Society's values weighed' (3 December 1986) Globe and Mail.

⁵⁴ Eg: 'Unreasonable act' (3 December 1986) Toronto Sun.

During the period of debate, three points in particular are worth making about press participation. First, up to the point of the amendment's passage, there was virtually no reported comment from CGRO activists or any other lesbian and gay spokespeople. Second, the campaign and views of the Coalition For Family Values (CFV) did receive a great deal of publicity;⁵⁵ however, in the Star and the Globe the CFV was portrayed as extreme, vindictive, and 'out of touch'.⁵⁶ Thus, whilst the views of the anti-amendment lobby were widely disseminated, much of this took place within a context of condemning those views and the tactics employed by those holding them.

Third, the only perspective publicly endorsing the amendment's passage was that embodied by liberal ideology. The editorials of the Star, Globe, and Ottawa Citizen, for example, all used the language of tolerance, pluralism, and spoke of Canada's 'great history' as a human rights leader. These writers further insisted that the amendment was simply a way of extending basic liberal values to a group suffering discrimination, and did not signify in any way a radical re-structuring of society. Even the Sun's editorial decrying the amendment's passage insisted upon

⁵⁵ Particularly in the Toronto Sun, see for example: J. McLeod, 'Bill banning anti-gay bias "powder keg"' (10 October 1986); L. Goldstein, 'Group raises new adoption fears' (3 December 1986).

⁵⁶ See previous discussion; also M. Maychak, 'Emotions ran high as lobbyists swamped Queen's Park' (3 December 1986) Toronto Star.

that paper's support for "equality" and its condemnation of "persecution".⁵⁷

Thus, a short review of press coverage shows that the values expressed by liberal politicians during legislative debate were the same as those providing justification for the amendment in the major newspapers. The defenders of the amendment were not lesbians and gay men themselves, or their representatives, but rather, politicians, reporters, and editors.⁵⁸ The lesbian and gay movement had almost no entry into what was communicated to the public through the press.⁵⁹

This process of exclusion (and, as I discuss below, self-censorship) ensured that the 'minority' lesbian and gay subject dominating the Bill 7 stage rendered invisible an alternative, feminist construction of, for example,

⁵⁷ See above. The hegemony of liberal ideology is further demonstrated in action taken by the Ontario Conference of Catholic Bishops following the amendment's passage. A member of the Coalition for Family Values, the Conference later insisted that it did not approve the CFV's press releases, had not supported the organisation financially, and were in favour of "basic human rights". See M. McAteer, 'Catholic bishops deny launching campaign against homosexuals' (4 December 1986) Toronto Star; R. Spiers, 'Thou shalt not defame others' (6 December 1986) Toronto Star.

⁵⁸ I am not suggesting that none of these people were lesbian or gay, but that they were not speaking 'as' lesbians or gay men.

⁵⁹ Some activists were quoted in the press the day after the amendment's passage, see M. Maychak, 'MPPs vote to give homosexuals protection from discrimination' (3 December 1986) Toronto Star A1; G. Drummie, 'Victory for "dignity" applauded' (3 December 1986) Toronto Sun.

"compulsory heterosexuality" (Rich, 1981). Indeed, with the exception of Evelyn Gigantes' speech in the House (which appears to have been ignored by the media), heterosexuality remained an unstated, unquestioned norm against which others were measured and perceived to be 'different from'. As I have argued, this obfuscated an understanding of the relationship between sexuality and gender, whilst further entrenching, and hence leaving unchallenged, principles of liberal equality ideology. Instead, lesbians and gay men were to be allowed into the 'human family' through the paternalistic benevolence of political patriarchs.

Aside from how CGRO and its supporters contributed to the ideological hegemony of legal liberalism through their choice of discourse, the pro-amendment campaign had other, related, effects. The very goal of the pro-amendment campaign meant that the Human Rights Code itself remained unquestioned. Unquestioned not only as a legitimate way of addressing systemic oppression, but, also, the mechanisms and procedures of the Code could not seriously be challenged within such a strategy.

The experiences of classes of people previously included in the legislation, for example under the grounds of 'sex' or 'race', have not been positive. Particularly in the area of race discrimination, the Code has not proved to be an effective weapon at all. The Code's individual

complaints (and perpetrator) model, coupled with the Commission's mandate to conciliate and effect a compromise, have not been perceived by human rights 'consumers' to have aided in eradicating racism in Ontario.⁶⁰ The experience of many people who have filed complaints is one of massive delay, bureaucratic bungling, and poor results.⁶¹ These and other criticisms have been made of anti-discriminatory structures in the United States (Freeman, 1982) and Britain (Fitzpatrick, 1987). Further, as Kristen Bumiller (1988) has documented, many people who could file complaints, for a variety of reasons, do not.

Bumiller, drawing upon Foucault's work, has argued that modern anti-discriminatory law is continuous with older mechanisms of social regulation (1988). It functions as such by constructing a "classification of identities" (Bumiller, 1988:61) - categories of persons who are, in some way, 'lesser than' an unstated norm (1988:69). She suggests that American civil rights legislation produces subjects that are not able to effectively engage in social struggle. The "victims" of anti-discriminatory provision are passive on-lookers, who play little or no role in redressing the abuse they have experienced. Indeed, the form of law in this area produces individuals who decline

⁶⁰ Eg: D. Harrington, 'Rights watchdog fails racial groups director admits' (14 September 1985) Toronto Star A10. See also, Frideres and Reeves (1989).

⁶¹ Re sex discrimination, see: Cote and Lemonde (1988); Mossman and Jai (1979); Reaume (1979); Backhouse (1981).

to identify their problem as a 'legal' one, blame themselves for what they have suffered, and create non-legal "strategies of resistance" that succeed in further entrenching their "victim" status. Bumiller concludes that anti-discriminatory law is another form of modern discipline, producing self-policing identities, and ensuring the channelling of resistance in ways that do not radically shift the balance of power (1988).

Whilst Bumiller's analysis tends, as do many Foucauldian approaches, to reify an all-powerful discourse,⁶² she nevertheless provides an important insight into understanding human rights law. These legal regimes produce and enshrine fragmented identities; people are forced to compartmentalise their complex subjectivities in order to 'make a claim'. Often, as Bumiller notes, the result is not to make a claim at all. Instead, individuals construct their 'problem' as trivial, view human rights law as ineffective anyway, and often get more satisfaction from 'sacrificing' themselves (by not complaining) than by 'losing control' through entanglement in bureaucratic procedures (Bumiller, 1988:82-107). Ultimately, all of this serves to channel and diffuse social protest by reinforcing the "victimisation" of the legislation's alleged beneficiaries (Bumiller, 1988:39;49-51).

⁶² See Habermas' (1987a:290-3) critique of Foucault.

One study of lesbians' views of Bill 7 itself, conducted a few years after the amendment's passage, would seem to confirm Bumiller's research. Didi Khayatt (1990) found that lesbian teachers knew about the amendment, felt it was important "psychologically", but were under few illusions as to what the Code provided in the way of redress. No teacher felt more able to come out as a result, and, whilst they tended to believe the Code would be helpful if they lost their job due to discrimination, most felt that the work atmosphere, should they be reinstated, would be intolerable (Khayatt, 1990). As the Reports of the Ontario Human Rights Commission show, extremely few complaints based on "sexual orientation" have been made.⁶³

During the Bill 7 struggle, lesbian and gay campaigners were not unaware of these issues; indeed, the CGRO brief makes explicit reference to some of these concerns.

Prejudice and oppression are not automatically eradicated by legal protection, as is shown by the experiences of women and people in our community oppressed by racism or religious intolerance. Long after sexual orientation is added to the Human Rights Code, we can expect discrimination against us to continue. Getting rid of deep-rooted anti-gay attitudes will require more fundamental social change than is to be achieved by expanding the interpretation and enforcement of the law (8).

⁶³ For example, there were 20 sexual orientation complaints in 1987-88 (1% of total received, 21 in 1988-89 (1% of total received), and 33 in 1989-90 (2% of total received). See Ontario Human Rights Commission, Annual Reports, 1987-88, 1988-89, 1989-90.

Thus, at the same time as campaigners and supporters expressed the importance of amending the Code, enhancing its status as an agent of social change, a message was also being given out that the amendment's effects would be minimal. This is most clearly revealed in the political speeches of amendment supporters during legislative debate. Member after member minimised the significance of the amendment, arguing that its achievement would barely cause a ripple of change in social life, at the same time as insisting that the amendment must pass if Ontario society was truly to reflect liberal values. MPPs Scott, Johnstone, Reville, Mackenzie, Wrye, Rae, and Peterson all discussed at length what the amendment would not do.⁶⁴ Much of this denial was to counter the right's doomsday rhetoric; nevertheless, these politicians were also expressing the commonly-held view that human rights laws make little difference to people's day-to-day lives. Indeed, at one stage Attorney-General Scott advised lesbians and gay men to engage in Charter-litigation if they wanted to achieve substantive new rights; the Code, he suggested, was not the appropriate instrument.⁶⁵

⁶⁴ See, respectively, Ontario Hansard: 25 November 1986, 3619; 26 November 1986, 3669; 1 December 1986, 3788; Ibid., 3804; 2 December 1986, 3838; Ibid., 3849; Ibid., 3856. See, also, Cicchino et al. (1991) for a discussion of a similar process in an American campaign.

⁶⁵ L. Hirst, 'Courts the place to fight for rights homosexuals told' (13 December 1986) Toronto Star.

However, for the Coalition For Gay Rights in Ontario, amending the Code was seen to be necessary not because doing so would end discrimination against lesbians and gay men, but because doing so would signal that 'society' was formally condemning homophobia. The amendment was viewed as a significantly symbolic gesture (see Elder and Cobb, 1983; Edelman, 1988). Following its passage, David Rayside, a CGRO spokesperson, in one of the few CGRO contributions making it into the mainstream press, was quoted as saying that although the amendment would do little to change people's daily lives,

I think this kind of legislation sends out a signal. And I think it's a much longer term process. It's not evident in the courts and tribunals. It happens in the hearts and minds of people. And that can take a decade, two decades, half a century.⁶⁶

Three days later however, other CGRO activists were quoted making quite different comments. John Argue, also active in the NDP Gay Caucus, argued the amendment would ensure the extension of health benefits to same-sex couples, and Tom Warner predicted that "there will be complaints in a wide range of areas", including child custody law.⁶⁷ At the same time, Ian Scott, the Attorney-General, was insisting

⁶⁶ Quoted in M. Maychak, 'MPPs vote to give homosexuals protection from discrimination' (3 December 1986) Toronto Star.

⁶⁷ Quoted in L. Hurst, 'Homosexuals see rights bill as key to new benefits' (6 December 1986) Toronto Star.

that the Code could not be used to challenge existing law, including child custody.⁶⁸

Paradoxically, or, perhaps, ironically, the choice to struggle for inclusion within human rights regimes legitimated legislative frameworks that even amendment supporters seemed to deride. This contributed to the enhancement of the Code as a favoured instrument of social change, marginalising the experience of those already all too familiar with its inadequacies. At the same time, a 'no major impact' rhetoric was partly deployed strategically to quieten opposition, and partly as an honest assessment of the Code's importance. Contradictory and conflicting messages, as to the point of law reform, were thus communicated, and the campaigners intended goals somewhat undermined. Finally, the constant repetition by liberals that Canada was a country with a 'great human rights record' served to perpetuate this racist myth and rendered the experience of those who would dispute it of no account.⁶⁹

⁶⁸ See his comments quoted in: L. Goldstein, 'Group raises new adoption fears' (3 December 1986) Toronto Sun; L. Hurst, 'Courts the place to fight for rights homosexuals told' (13 December 1986) Toronto Star.

⁶⁹ The history of systemic and institutionalised racism in Canada has been well-documented, in hundreds of sources which I can not do justice to here. A very broad sweep, in relation to the development of human rights law, is given by Anand (1985).

C. Concluding Remarks

In this chapter, I have argued that the goal of achieving inclusion within existing human rights structures renders more legitimate the legislation itself and its attendant ideologies. It also has these effects with respect to law in general. For example, the CGRO Brief implied that part of a solution to the discrimination and violence it detailed necessarily required legislation. The politics of the pro-amendment campaign succeeded in reifying law, the Code in particular, as an answer to 'social problems' (see Smart, 1989:161). Whilst within lesbian and gay communities, the amendment was viewed by most people as a first step of largely symbolic value,⁷⁰ and, as I have shown the brief itself partially makes this point, the wider public received contradictory messages. Whilst some activists and their lawyers implied that the amendment's passage assured the impending release of various benefits, liberal politicians argued the Bill would have little practical effect.

Some might question whether it is wise to distil for 'public' consumption a model of sexuality, and a view of formal institutions (like law), not particularly dominant within lesbian and gay communities. Others have argued that, as a first step, particularly in a neo-conservative climate, it is necessary to do so (Cicchino, et. al.,

⁷⁰ See, for example, the Bill 7 coverage in (1987) 3 (8) Rites, including comments by CGRO activists Bearchell and LaChance.

1991:628). Could the members of CGRO have chosen to challenge the legal assumptions, rather than accommodate them, and provide for Ontario's 'public' a justification for human rights protection not reliant on traditional liberal ideologies?⁷¹ Why was the voice of a heterosexual feminist MPP the only one to link homophobia to male domination? If she could do this standing on the floor of the Ontario legislature surrounded by over one-hundred men, was there not, perhaps, more room to communicate a progressive sexual politics than amendment campaigners allowed?

Chris Bearchell, a long-time Toronto lesbian activist and CGRO campaigner during Bill 7, deems such questions irrelevant (interview). Communicating a radical sexual politics to 'the public' was not CGRO's priority. She argues that the point of the campaign was to organise and politicise lesbians and gay men, not the heterosexual 'public' (interview). CGRO used the Code struggle to draw lesbians and gay men into a political battle, to educate them, and to facilitate a province-wide lesbian and gay network. According to Bearchell, 'radical rhetoric' is not effective at moving lesbians and gay men to the left; people's politics shift through their engagement in grassroots struggles, and through their relationship to a community (interview).

⁷¹ For one such attempt, see the factum of EGALE et al. in Mossop (at the Supreme Court of Canada). Further discussion in Chapter 6 and 7.

Other CGRO activists might not concur with Bearchell's views as to the 'point' of the CGRO campaign. Nevertheless, her comments are important in terms of pointing out the divergent concerns of academics and activists. Much of this chapter has been an inquiry into the dominance of liberal ideology in public debate around sexuality, particularly in the context of Bill 7. One of my concerns was that oppositional gay and feminist sexual politics were seemingly structured out of the legal process in this instance. Yet, as Bearchell's comments suggest, CGRO itself made little effort to inject an alternative perspective into the debate, choosing instead to rely, for pragmatic reasons, upon liberal rhetoric. It may be, therefore, inaccurate to suggest that alternative perspectives were excluded at the stage of public debate; in fact, communicating an alternative sexual politics may have been deemed either impossible or unimportant by CGRO itself at an earlier stage - hence, the lone parliamentary voice of Evelyn Gigantes.

The intentions of CGRO, or any other sector of the lesbian and gay community, are not unimportant. However, my concern is precisely with unintended implications, and under-considered effects. By choosing, for whatever reasons, non-threatening rhetoric and 'acceptable' campaign strategies, lesbian and gay communities, I have argued, leave unchallenged liberal principles, and contribute to

the entrenchment of problematic concepts such as the minority rights paradigm.⁷² At the same time as some lesbians and gay men were being politicised into a lobbying campaign, the identity they were being asked to take on was that of the 'minority' subject of liberal human rights law. In contrast, perhaps, to Bearchell, I do not view 'politicisation' as an inherently progressive process; the support of lesbians and gay men for human rights protection for ourselves says very little about the character of our political commitments in other areas.

Furthermore, the decision not to infuse the debate with alternative ideas about sexuality was, as I have noted, an abandonment of the field to liberals and the right. The effects of pragmatic political struggle are seen not solely in terms of what was communicated to the heterosexual public, but also in terms of what was communicated to lesbians and gay men in the mainstream media. CGRO's choice to be a voice of lesbian and gay liberalism, implicitly meant that the organisation was not speaking for feminist, socialist, and other progressive lesbians and gay men. Thus, whilst some apolitical people may have been gathered into the process, others, such as myself at the time, became increasingly marginalised from the 'public face' of the lesbian and gay movement.

⁷² Jeffrey Weeks (1985:195-201) seems to suggest that the concept of 'minority' may be transformed through its adoption by lesbians and gay men; I do not see much evidence of this in Canada. See also Kinsman (1987:190-3). I return to this point in Chapter 8.

CHAPTER 4

BEYOND THE RIGHTS DEBATE

Chapter 2 began by suggesting that the struggle to amend Ontario's Human Rights Code was one about inclusion within liberal equality discourse, rather than about 'rights' per se. In this chapter, I wish to consider how 'rights rhetoric' was deployed by various agents in the struggle over Bill 7, as well as by actors involved in the Mossop litigation.¹ By rights rhetoric, I particularly mean rights as/in speech - the language of rights - although I also consider demands for a right or rights. I have argued that it would be inaccurate to characterise the lesbian and gay human rights strategy simply as a demand for an abstract right; nevertheless, the language of rights did play a role, and does so more significantly in other lesbian and gay legal struggle.

In the previous chapter, I suggested that liberal ideology achieved authoritative dominance on the Bill 7 stage. Rights is arguably one of the most significant rhetorics of liberal equality. The claim of a 'right' and the rhetorical deployment of phrases such as 'we have a right to...', are evocative, persuasive symbols in contemporary social struggle. In this chapter, then, I

¹ See Chapter 2 for a description of this case.

focus specifically on rights rhetoric as a 'tool' social movements wield whilst engaging in political action.

However, the use of rights rhetoric has been a frequent subject of criticism by legal scholars. I begin by broadly outlining various positions within what has become known as the 'rights debate' in critical legal theory, and then continue with a discussion of the questions raised by this literature with respect to Bill 7. Following this, I expand the field of inquiry to include the views of social movement actors, particularly those involved in the Mossop litigation, and also consider related issues to do with mobilisation and communication.

A. Bill 7 and the Rights Debate

Most progressive legal theorists agree that 'rights' (as objectives and discourse) are potentially problematic. The main point of disagreement, as I read it, is between those who characterise 'rights' as abstract, individualistic, disempowering, and obfuscatory,² and those who say rights struggles may be these things, but they can also, perhaps simultaneously, be empowering, necessary, foci for resistance.³ From either a marxist or

² Freeman (1982); Fudge (1987, 1989); Fudge and Glasbeek (1992); Gabel (1984); Glasbeek (1989a, 1989b); Kingdom (1991); Mandel (1989); Smart (1989); Tushnet (1984).

³ Hunt (1990); Matsuda (1987); Minow (1990); Schneider (1986); P. Williams (1987); R. Williams (1987).

poststructuralist position, rights-critics argue that current rights struggles are either examples of a depoliticised culture, or questionable invocations of dangerous discourse. 'Rights defenders', on the other hand, some of whom also espouse socialist and poststructuralist perspectives, emphasise the positive effects of rights struggles upon social movement mobilisation and individual consciousness, whilst tending to marginalise the structural and discursive constraints noted by the 'rights critics'.⁴

Many writers, on either side of the debate, often use the word 'rights' inter-changeably with 'law' or 'litigation' (the latter two also tending to be used as if they meant the same thing, particularly in American legal theory). Debate is, in my view, further clouded by the fact that quite different 'rights regimes' are often being discussed. For example, in North America, those defending civil and human rights statutes often argue with those critiquing entrenched constitutions. It is unclear, and usually unaddressed, to what extent rights frameworks can be analytically distinguished, thus rendering critiques and defenses more specific to their context.

In exploring struggles such as Bill 7, a number of questions are raised by this literature. How helpful is it

⁴ For a critical review of much of this literature, see Bartholomew and Hunt (1990).

to characterise this conflict as one about 'rights'? Certainly, rights rhetoric was deployed by all parties; however, can this dimension alone be said to constitute the 'substance' of the struggle? Bill 7 was an act to amend the Ontario Human Rights Code; does this fact reveal something significant about the struggle's 'essence'? Further, are the implications of rights struggles inherently negative, or does the language of rights, as some argue, assist in the building of an 'interpretive community', an arena of shared understandings facilitating political communication (Minow, 1990)? Or does rights rhetoric, as others contend, obscure fundamental relations whilst de-politicising social struggle (Fudge and Glasbeek, 1992)?

First, with respect to Bill 7, one must question the usefulness of those analyses which are litigation-centred, those which proceed on the basis that the achievement of abstract rights per se was the goal, and those which focus on the individualistic character of rights claims. The fight for Bill 7 needs to be analytically separated from questions to do with Code utilisation; furthermore, I have argued that CGRO and its constituency desired positive social recognition (not abstract rights). In addition, the pro-amendment forces advocated for rights on a collective, not individual basis. The anti-amendment forces countered this, not so much by asserting the individual rights of

others (although this was done by the tabloid press)⁵ but through implying that legislative protection condoned the sexual (and immoral) 'lifestyle' of a political group by giving them 'special rights'. For both sides, Bill 7 clearly invoked the collective 'lesbians and gay men' (or 'homosexuals'), rather than the individual lesbian or gay supplicant.

Furthermore, whilst the 'pro' campaign masked one 'reality' of the lesbian and gay movement (in the sense of minimising underlying political divisions and presenting a homogenous community), it could not be characterised as 'abstract'.⁶ For example, incident after incident of discrimination and often brutal violence was detailed in the CGRO brief.⁷ The liberal press picked this up, focusing on the theme of 'discrimination'; its editorials used rights rhetoric to address questions relating to the necessary eradication of unacceptable prejudice in liberal

⁵ For example, a Toronto Sun columnist asserted the rights of families and social agencies, likening the amendment to laws curtailing individual rights in a wide range of areas (including anti-smoking by-laws). The amendment is viewed as 'one more assault on individual freedom by a pandering, over-interventionist state. See J. McLeod, 'Gay way is 'ok'...so there!', Toronto Sun (14 October 1986). Another editorial lamented the amendment's impact upon employer's and landlord's rights, see 'Sober look needed before Bill passed', Niagara Falls Review (9 October 1986).

⁶ Some 'critics' are speaking about only constitutional rights when discussing abstraction. However, this is not always made clear.

⁷ See Chapter 3.

democracies.⁸ At issue for the amendment supporters were not 'rights' per se, but, rather, questions to do with 'what is right', particularly with respect to the extension of 'tolerance' and other liberal values, and the role of the state in facilitating these values.

Similarly, the Coalition for Family Values deployed the language of rights strategically. They and their supporters argued that lesbians and gay men wanted "special rights".⁹ For them, the amendment signified official condonation of a "lifestyle" choice.¹⁰ 'Rights', thus used, meant privileges. In their legislative briefs, conservatives worked to distance homosexuality from other 'characteristics' receiving human rights protection.¹¹ In their less official materials, the CFV and others described homosexuality as a predatory lifestyle, posing a danger to

⁸ Ibid.

⁹ See comments of following during debate: Haggerty, Ontario Hansard, 25 November 1986, 3639; Villeneuve, Ibid., 26 November 1986, 3682; Gregory, Ibid., 27 November 1986, 3738; McCague, Ibid., 1 December 1986, 3792; Leluk, Ibid., 3835.

¹⁰ See: Bernier, Ontario Hansard, 25 November 1986, 3634; Johnson, Ibid., 26 November 1986, 3642; Hennessy, Ibid., 3678; Partington, Ibid., 3684; Barlow, Ibid., 3688; Marland, Ibid., 27 November 1986, 3743; Sheppard, Ibid., 3748.

¹¹ See, for example, Brief of the Evangelical Fellowship of Canada on Homosexual Legislation: An Evangelical Response, July, 1986, Gay Archives. Interestingly, it could be argued that this process helped to legitimise the pre-existing Code protections, despite the likelihood of right-wing objections to human rights regimes generally (see Chapters 5 and 6).

young children, and expressed through practices such as paedophilia, necrophilia, and bestiality.¹² Human rights protection, then, would make it impossible for 'good people' to protest against such practices by giving homosexual practitioners 'special rights'.

It seems unhelpful to analogise the appearance of rights rhetoric in the Bill 7 episode with that existing in, for example, abortion debates. Bill 7 was not about a 'conflict of rights' requiring some kind of political balancing.¹³ Such a conflict is a potential result of human rights adjudication; for example, a situation where a gay man files a complaint based on a newspaper's refusal to run his explicitly same-sex personal ad may well centre on the man's 'right to be free from discrimination based on sexual orientation' as balanced against the paper's 'right to freedom of the press'.¹⁴ Whilst it may be appropriate to question lesbian and gay human rights strategies on the basis that Code utilisation may lead to a 'duelling rights' showdown (although this seems a criticism of institutional practice rather than a comment on the 'nature' of language), the political struggle over amending the Ontario Human Rights Code did not itself raise these issues.

¹² See also Chapter 5.

¹³ This is Alan Hunt's (1990) example - however, it seems an inappropriate one from which to generalise. Elizabeth Kingdom (1991) notes the specificity of this example, although much of her book nevertheless seems to generalise from it.

¹⁴ See discussion of GATE case in Chapter 2.

Carol Smart (1989), another 'rights critic', makes a different point to the ones above. She suggests that rights achievements bring increased state surveillance as claimants must "conform to specification [as] a prerequisite for exercising such rights" (1989:162). State agencies must collect information, ensuring individuals 'fit' the category under which they are claiming. I would argue, however, that not all rights claims necessarily bring increased surveillance. The law reform achieved by lesbians and gay men through Bill 7 does not appear to do so; 'proving' one's sexual orientation (or race or sex) is not a prerequisite for redress under the Code. What one must prove is discrimination on the basis of a listed factor which it is assumed the claimant possesses. One need not reveal the intimate details of one's life, only those 'relevant' to the allegations at hand (legal relevancy is, of course, a highly problematic concept). However, with respect to other kinds of legal claims, for example a gay couple's claim to be a 'family', Smart's warning becomes more meaningful. As I noted in Chapter 2, and explore further in Chapter 7, 'expert' constructions of homosexuality play an important role in categorising and constituting lesbian and gay 'families'. Nevertheless, even when lesbian and gay rights struggles do bring increased surveillance, they may also offer points from which to resist.¹⁵

¹⁵ See comments in conclusion to Chapter 2.

Another aspect to the rights-critique is to suggest that individuals and social movements are 'fooled' by the promise of rights. Rights become reified in political struggle, by a duped or mystified constituency labouring under a kind of false consciousness (eg: Gabel, 1980). Michael Mandel, for example, refers to Charter rights as a "hoax" (1989:308), whilst Judy Fudge indicates that Charter-using feminists "accept" prevailing discourse, "assume" the state is an instrument, and "see" the courts as autonomous and rights-claims as self-executing (1989:459). Whilst I accept and am persuaded by many of the arguments made by these writers, I find this view of social movement struggle to be somewhat unhelpful - at least with respect to lesbian and gay political activity.

During the Bill 7 episode, a comparison, for example, between the CGRO brief and Bill 7 editorials, and commentary from CGRO activists in the radical lesbian and gay press reveals the extent to which the discourse of liberal pluralism was deployed strategically, and did not indicate a duped or mystified lesbian and gay community.¹⁶ In fact, one of the principal architects of the CGRO campaign, partially responsible for its careful, liberal, muted tones, was a gay man who, in a later article, described himself as holding socialist-feminist beliefs.

¹⁶ See CGRO Brief and issues of The Body Politic and Rites.

David Rayside (1988) has provided a sophisticated, political defense of human rights strategies within a committed left-wing perspective. Another CGRO activist, Chris Bearchell, expressed in an interview having had a similar perspective and strategy. There is no reason to doubt that many other lesbians and gay men reached similar conclusions after much deliberation, either being genuinely persuaded that rights campaigns were theoretically defensible, or that they were, simply, necessary, pragmatic steps.¹⁷

Within lesbian and gay rights movements, few, if any, people believed that winning Bill 7 would achieve equality, much less liberation. The human rights code strategy was always one amongst many; it was viewed as a necessary step, as much a symbolic hurdle as a material benefactor. 'The law' was resorted to because it was there, the structure existed, and, as modern lesbian and gay identity emerged and consolidated, analogies between lesbian and gay experience and other 'oppressions' were made. The admonitions of some theorists not to expect serious change from law reform seems, in the case of Bill 7, to be misplaced. Whilst the public rhetoric of the pro-amendment forces suggested that discrimination against lesbians and gay men would end with their incorporation into human rights legislation, few were so naive as to seriously believe this (see Khayatt, 1990; Ross, 1990). The

¹⁷ See also Chris Bearchell's comments, Chapter 3.

discourse deployed was strategic and hopeful, not indicative of a wistful, trusting, submissive approach to law or belief in law's neutrality, objectivity, and so on.¹⁸ In order to more fully explore the 'rights perspectives' of social movement activists, I consider below the views of several actors involved in the Mossop litigation.

B. Experiential accounts

[1] Conservative Christian perspectives

As I discuss in Chapters 5 and 6, conservative Christian activists have become increasingly involved in trying to stem the tide of lesbian and gay equality. Here, I wish briefly to consider some of their views on rights claims and rhetoric.

For Don Hutchinson, a Captain in the Salvation Army of Canada and its legal advisor, rights rhetoric and claims are quite problematic. Rights move the focus away from a discussion of privileges, (which is what so-called rights 'really are'), and responsibilities, which is what people ought to have.

I don't like the word 'rights' because it implies that I can take something away from you. I prefer privileges and responsibilities...When we put it in the context of rights, we start to get

¹⁸ I have, however, previously discussed the dangers of presenting just such a view to the press and public, see Chapter 3. It seems to me that these two points are different.

into a battle between you and me about what I can do, and what you can do, as opposed to what the society we live in permits us to do. The question of rights tends to focus on individuals... (interview)

Hutchinson associates the dominance of a 'culture of rights' to the role of lawyers in formal politics.

We live in a very rights-oriented society which has partially come about because our principal legislators are people who were involved in the adversarial system, who have a very different perspective on life. (interview)

He argues that "when we start to focus on rights, we start to move away from a focus on needs" (interview).

Judy Anderson, President of REAL Women, has similar views.

I'd like to see a Charter of responsibilities rather than a Charter of Rights...the Charter of Rights pits group against group, ideology against ideology...rights have become paramount to everybody...the Charter creates a more selfish society, [it's] win/lose and makes society more polarised, makes people less willing to compromise (interview)

Anderson's opinion of other human rights legislation is also largely negative. Whilst she believes in the idea of having human rights laws, she characterises the Ontario Human Rights Commission as "social engineers" and "Big Brother", telling me a story about a friend who has been, unjustly in her view, charged with race discrimination under the Code and "intimidated" (interview).

Hutchinson and Anderson's opinions on rights, at times, appear similar to those of the rights-critics discussed above. Whilst progressive theorists tend not to

engage in a discourse of 'privileges and responsibilities', they do identify social life as being overly rights-oriented and litigious. Some, in keeping with Don Hutchinson, also prefer to focus on notions of 'needs', rather than rights. Others, like Anderson, have discussed the problems inherent in a means of adjudication which insists on a 'winner-take-all' resolution. In a subsequent chapter, I discuss how conservative Christian leaders associate the Charter and the Supreme Court with an assault on local democracy - yet another point at which they and the rights-critics converge.

[2] Lesbian and gay perspectives

In interviewing lesbian and gay rights litigants and lawyers, I found that few concerned themselves with the meanings of 'rights' per se, or with many of the issues with which theorists occupy themselves. Instead, people cared about the extent to which they received publicity and were able to publicly communicate their lesbian or gay politics, and/or mobilise others. For many, impact on a personal level was not due to qualities intrinsic to rights rhetoric or claims, but was simply a consequence of being engaged in public legal struggle.

Karen Andrews, for example, went to court to have her household declared a legal 'family' for the purposes of receiving dental coverage, not for 'rights' in the abstract

(interview; see also Andrews, 1989). She found her experience with the legal process to be "a productive use of anger" (interview), despite losing her case (Andrews, 1988) and having her grounds for appeal rendered moot. She believes that her case made people think about lesbian and gay issues, and have to look at pictures of a lesbian couple on the front page of their newspaper for the first time (interview). According to Andrews, the litigation process was a success, regardless of outcome, as she was able to appear regularly in the media and be a prominent public spokesperson (interview).

Brian Mossop and Ken Popert, two gay litigants whose 'family benefits' case is currently before the Supreme Court of Canada, agree with this assessment. For them, their legal case was simply a "way of getting yourself on radio or television, so you can say things and millions of people can hear it" (Mossop, interview).

There are only a limited number of ways in a society like ours that you can gain access to the mass media, one of them is to hold demonstrations, one of them is to launch some kind of legal case. The media defines the forums in which it's possible to find the platforms...

It's very useful now we have the Charter of Rights, it's a legitimate subject, no one questions, as they might have before the Charter, whether there is such a thing as "rights"...Rights gives you a language. (Popert, interview)

Somewhat unsurprisingly, Andrews, Mossop, and Popert were all quite dismissive of academic opinion condemning rights struggles. Karen Andrews finds academics to be

disrespectful of social activists, and believes they write little of relevance to 'real people' (interview). According to Ken Popert,

It's only lawyers and academics who actually are fooled and think that rhetoric is the only thing going on. Most people understand what the real questions are, even though it's being cast in a different way. (interview)

Brian Mossop argues that when he and Popert appeared on radio shows about their case, callers wanted to talk about "homosexuality", not rights, or law, or litigation. The ability to do this, gain access to the media to talk about homosexuality, was the whole point of the action.

The main audience is the youngest generation of people who are listening, people who maybe have not come out yet...who are worried about what life holds in store for them. We go on the radio and say - here we are, we're a gay couple...it doesn't have to be all that bad...maybe you could consider telling one of your parents...the whole point is for people to come out earlier and earlier and earlier...(Mossop, interview)

For these gay litigants, a case which they have lost on appeal (Mossop, 1990) has been an unqualified success. In response to a question about how radical analyses of sexuality are excluded from legal processes, Ken Popert stated that he doesn't "particularly care what is said in factums, or in court" (interview).

Certainly, this is not true for all those involved in lesbian and gay legal struggle. Karen Andrews, whilst critical of academic endeavours, nevertheless expressed some interest in legal arguments made on her behalf

(interview). The coalition of progressive organisations intervening in the Mossop case (see Chapter 2) took great care with the writing of their legal submissions. For Gwen Brodsky, the coalition's lawyer, getting the right language, tone, and politics was crucial (interview).

Brodsky, too, has little time for the 'rights critics'. She believes such writers are far removed from the concerns of "disadvantaged people" (interview). In contrast to much critical theory on the Charter, for example, Brodsky argues that the Charter's advent has encouraged social movements to build coalitions and think about what equality means in the concrete.

...the possibility of increasing rights, to take steps to secure more rights, has helped the community-based organisations to mature, and has given them a focus that they didn't have before. It has created both the opportunity and the necessity to try and figure out what's being talked about in any given circumstance where equality is the essential objective. Ten years ago, I don't think there were conversations in community organisations about what equality meant. The lobbying was more ad hoc, there was not much opportunity to figure out unifying themes....(interview)

Interestingly, Brodsky closely ties these developments to the Court Challenges Programme which, until 1992 (subsequent to the interview), provided public funding to groups seeking to challenge discriminatory laws.

...if there hadn't been any money available through the court challenges programme to allow groups to undertake litigation, and to have national consultations to formulate their positions in the litigation, the Charter would not have had the effect I'm talking about at all...to the extent those funds exist, they have fuelled an interest among the community

organisations to better understand their own positions...and that's empowering, to even have the sense that there's a chance of success in an effort to secure increased rights. (interview)¹⁹

In contrast to Ken Popert, Brodsky believes the factum-writing process to be an important one for the social movement organisations involved. What the judges think of it, whilst important, is not the only issue. Preparing a legal submission on behalf of diverse interests has been, according to Brodsky, a growing and learning experience for all participants.

It's a very different experience to try and do litigation that is respectful of the clients, is an empowering experience for them, does place control in their hands, that's a very different thing from the traditional model of litigation...really listening for hours and hours, going away and re-drafting a factum 12, 15, 20 times, sending it out to 10, 15, maybe 20 people, who then send it out to their boards, sub-committees...it grows and advances as we work, in the process of talking about what our position ought to be, how to express it, the different co-intervenors have heard one and other...the factum really will be a collective effort. In a situation like this, you just don't release it until you have something that people are prepared to say is theirs. All of them. To claim it. (interview)

For these groups and their legal counsel, the goal is not 'to get on the radio', but to collectively share knowledge and experience, and, eventually, write a document that all can feel is "theirs" -that does not advocate equality for some, at the expense of others (Brodsky, interview).

¹⁹ Brodsky further discusses access to justice issues in Brodsky and Day (1989).

Brodsky's comments suggest that critical scholars have perhaps devoted insufficient attention to the positive role of federal funding programmes in facilitating social movement networking. Progressive writers often focus on how state funding constrains and co-opts actors and movements (see, for example, Findlay, 1987, 1988; Schraeder, 1990); however, Brodsky argues that this was not the case with the Court Challenges Programme. Administrators usually acted in an arms-length fashion, and did not attempt to control or police the organisations they funded. However, at the time I interviewed her - prior to the cancellation of the Programme - Gwen Brodsky also noted that Ministry bureaucrats were increasingly attempting to assert control over the Programme, one recent change having been to curtail meeting funds allocated to legal coalitions (interview). According to Brodsky, many of the positive effects facilitated by social movement Charter litigation would therefore no longer be possible. Concern with the effects of the Programme's cancellation in February 1992 again points to the vastly divergent agendas of social movements and critical scholars.

At this point, I would like to briefly offer an experience of my own as example. During the Bill 7 struggle, I was a member of (although not an activist within) the Coalition For Gay Rights in Ontario. I responded positively to their calls for letter-writing and phone calls to MPPs, encouraging family and friends to do

the same. I attended the rally at St. Lawrence Market on 20 November (see Chapter 3). At the same time, I entertained serious doubts as to the merits of the demand - from within both my feminist and socialist perspectives. Nevertheless, I felt that it was incumbent upon me, as a lesbian feminist, to show solidarity with this lesbian and gay struggle, despite my reservations.

When legislative debate began, I decided to stop off on my way home to have a look and listen. I returned nearly every afternoon, fascinated and appalled. What I remember most were the speeches of Conservative Party backbenchers, filled with hatred and disgust, directed, as I experienced it, at me.²⁰ Describing what I heard the next morning, my straight law school friends (I was in my first year) would say, "how could you bear to sit through that?". And yet, somehow addicted to the spectacle, I went back each day for more.

Not being a party to 'insider' knowledge, I had no way of telling (the media was ambiguous) whether the amendment would pass or fail. When the vote was called, and the amendment's passage announced, the portion of the gallery where I sat erupted into applause, many of us hugging and

²⁰ Becki Ross (1990) has written about her feelings, sitting in the Ontario legislature, day after day, like I did. She, too, had no illusions about the ability of the Code amendment to effect major social change; however, her experience of 'house sitting' had a significant impact upon her view of the Bill.

congratulating each other. Was I duped into believing that this victory meant I was now a liberated lesbian? I do not think so; although there is no doubt that the Bill 7 experience moved me, in various ways. I can't say that I felt 'empowered'; I knew the Code would be a most ineffective instrument. I did not feel that my participation as a social movement organisation 'constituent' left me particularly powerful as an individual; although I did get some sense that the lesbian and gay movement as a whole had been strengthened through the process of obtaining a 'victory', whatever its content.

I did, however, feel a strong sense of self-affirmation. Bill 7's passage gave me increased confidence; its defeat would have felt demoralising, both on a personal and collective level. The 'self' that was affirmed for me was the construct of lesbian feminist politics, not legal equality discourse, although it troubled me that 'the public' had been presented with something else.

C. Rights Are Neither 'Good' Nor 'Bad'

Does all this then mean that, as some argue, rights rhetoric necessarily serves important positive functions within political struggle? Alan Hunt (1990), for example, suggests that the language of rights claims is the kind of 'universal' discourse necessary to construct a new moral

order. In contrast to Fudge (1989:449), who warns that rights rhetoric can also be used by conservative forces, Hunt finds the fact that rights claims raise competing claims to be a factor in their favour, as this compels a serious public debate over which and whose rights should be prioritised. This argument, as previously noted, is only marginally applicable to the Bill 7 episode where the expression of competing rights claims was rare. Whilst the potential for a serious debate exists hypothetically, within the Bill 7 struggle no such engagement took place. Discussions of whose rights should have priority, for example a lesbian tenant's or a heterosexual landlord's, were rarely found.

I would agree with Hunt, however, that one cannot condemn a legal strategy solely upon its ability to be successfully deployed by opponents. The fact that rights rhetoric can be used by either side in a struggle is a fact neither in, nor against, its favour. Surely all strategies for change are potentially available to all those seeking it. This, in my view, says little about the efficacy of the strategy at any given moment, for any given movement. Words and strategies have no inherent meaning; struggles between social movements are exactly about and over the power to interpret. In the case of lesbians, gay men, and their opponents the meaning of 'family', 'spouse', 'normal', and indeed 'woman' and 'man' are at stake. Certainly, not all social movements have equal resources to

engage in these battles, and this is a point somewhat neglected by the rights-defenders. Yet, the fact of resource inequality says little about the intrinsic value of any particular goal. If rights rhetoric mobilises a progressive movement around a given issue, it seems tangential to counter-argue that right-wing movements could use rights to mobilise themselves. At the same time, it seems injudicious to suggest that such counter-movements are inherently facilitative of communication and justice, or that all movements have an equal capacity to mobilise and make successful public interventions.

Hunt (1990) goes on to espouse a perspective, drawn from Laclau and Mouffe (1985), that argues that new social movements "re-combine" elements of existing discourse in constructing a 'new' liberatory one. Thus, it is only 'natural' that social movements use rights rhetoric (Hunt speaks of making "rights claims"); the point is that rights are re-articulated in ways that transform them. In arguing his politics of "rights without illusions" (not dissimilar to Scheingold's position nearly twenty years ago)²¹, Hunt finds further encouragement in the fact that rights struggles play a role in constituting social actors and their identities. With respect to Bill 7, it is worth exploring each of these assertions in turn.

²¹ See Scheingold (1974). Hunt argues his conception of rights is not the neutral one of Scheingold's.

First, were rights and other elements "re-combined" within pro-amendment discourse in ways that could be said to be "counter-hegemonic" (Hunt, 1990)? I argued in Chapters 2 and 3 that 'rights' was used synonymously with 'equality', and that equality was implied to be achievable through inclusion within existing legal frameworks. It seems dubious whether this articulation was 'counter-hegemonic'. On the contrary, I have suggested that this approach entrenched principles and structures of liberal equality without challenging the paradigm's limitations.

The anti-amendment forces, on the other hand, articulated rights away from equality; 'gay rights' was synonymous with 'paedophilia' and 'bestiality'. Within a political climate increasingly responsive to lesbian and gay rights claims, it was the Coalition for Family Values' articulation that more clearly played an oppositional role. The fact that mainstream liberal politicians were sympathetic to CGRO, and appalled by the 'extremism' of the anti-amendment lobby also suggests this interpretation. Indeed, at the time, two Conservative Party MPPs took the unprecedented step of speaking out to the press about their disgust with the CFV campaign.²² It could thus be argued that there is nothing inherently progressive about engaging in 'counter-hegemonic opposition' - it depends on what (or

²² See comments of Susan Fish and Yuri Shymko, Canadian Press, 1 December 1986.

whose) 'hegemony' one is both fighting against, and attempting to create.

There is also no reason why progressive social movements necessarily re-articulate rights in such a way as to challenge power relations. On the contrary, many social movements deploy rights rhetoric conventionally; indeed, it is the expression of rights within traditional liberal epistemology and values that is often most successful in terms of social movement goal achievement, particularly when specific goals are to achieve inclusion within liberal legal frameworks. Certainly, this seems to have been the case with the Bill 7 sexual orientation amendment campaign.

Furthermore, the perspective of Hunt (and others) would seem to reify 'discursive struggle', finding it capable of achieving almost anything - most of which is somehow assumed to be progressive. Whilst the rights critics tend, in my view, to be overly dismissive and apocalyptic, the rights defenders take insufficient account of the limits and constraints within which progressive social movements work (see Fudge, 1987; 1989). Not all social actors have access to similar resources, means of communication, and so on. In addition, 'discursive elements' cannot simply be, as Martha Minow seems to suggest, "re-invented" and disseminated at will (1990:306-7). As Carol Smart (1989) has shown, powerful, oppressive discourses such as law can play a "colonising" role, 're-

combining' the expressions of progressive movements in unprogressive ways. And, as Joel Bakan has persuasively argued, institutional constraints can render the best intentions ineffective (1991).

With respect to Hunt's (1990) second point, it is no doubt true that legal struggles, and rights claims in particular, construct subjects and identities. I have no argument with this; however, why should this process be seen as an unqualified 'good'? Surely questions to do with what kinds of subjects and identities oriented to what end must be posed. In Chapter 3, I suggested that the form of many lesbian and gay rights claims entrenches the binary opposition between hetero- and homo- sexualities rather than seeking to transcend it. Human rights regimes pose, like criminal law, their own dilemmas of regulation. Is the minority model of homosexuality that dominated the Bill 7 struggle a positive, progressive one? Should we celebrate equally the right-wing's construction of the 'defender of civilisation and family' during this struggle? Not all social movements are to be applauded simply because they are social movements, 'new' or not.

Martha Minow (1990), another 'rights defender', suggests that the language of rights has a particular resonance, that rights rhetoric is so much a part of the fabric of social life that its deployment can achieve a

kind of shared understanding. Rights rhetoric "makes those in power at least listen" (1990:297).²³ She argues that,

The language of rights thus draws each claimant into the community and grants each a basic opportunity to participate in the process of communal debate (1990:296).

How helpful is this analysis?

Neil Milner (1986), in applying the views of Minow and others to his studies of two organisations involved in struggles over psychiatric patient rights, argues that "rights-talk" produced contradictory effects. On the one hand, an organisation of 'patients' families' expressed an anti-rights discourse, arguing that patients were incapable of exercising rights, and that a 'rights' model masked the reality of family caregiving (by giving patients rights against the state, which then undermined family decision-making) (Milner, 1986:653-8). And yet, this same organisation used "rights-talk" to build their own communal identity; Milner argues that the families appropriated rights language to ground their own collective claim to recognition as caregivers.

Organisations representing patient interests had, at the same time, their own rights dilemmas. On the one hand,

²³ Elsewhere in her book, Minow clearly implies that powerful "decision-makers" are well-intentioned people doing their best to resolve "the dilemma of difference" (1990:44-7). All that is needed to overcome inequality is for judges to understand the experience of 'others'; hence, Minow's relatively uncritical perspective on rights, which, in her view, facilitate such understandings.

groups argued for a general patient's right to choose and refuse treatments, based on the individual's capacity to make treatment decisions. At the same time, many of the same organisations advocated a different approach vis a vis electroshock 'therapy' -namely, special safeguards, or even banning, based on a model which constructed the patient as a 'victim' of coercive practices who could not exercise 'free choice' (Milner, 1986: 664-6).

Milner reaches several conclusions as a result of his detailed studies (1986, 1989). Whilst he suggests that the rhetoric of 'patients' rights' may build an 'interpretive community', he argues that these dominant understandings can then undermine popular struggles which highlight power inequalities, such as the anti-shock campaigns (1986:670; 1989:123). He also suggests that the "rights-talk" favoured by lawyers imposed a legal model upon the patients' movement, and fostered conflict between activists and lawyers (1986:665-6). Milner ultimately argues that rights language is a complex tool; its effects are not predictable. His research is one of the few attempts to actually study the role of rights within social movement activism.

Returning to the study at hand, it seems apparent that the articulation of lesbian and gay rights with liberal equality principles did succeed in building a kind of interpretive community. In the Bill 7 struggle, a liberal

consensus was achieved amongst both mainstream politicians and the press that 'homosexuals' deserved jobs and housing. As Rayside and Bowler (1988) have suggested, this consensus may extend to a majority of the Canadian 'public'. If one takes the view that a consensus formally condemning discrimination is a pre-requisite for more substantial shifts in practice and opinion, then this achievement is no small success. However, it can be just as easily argued that the interpretive community that Bill 7 and similar struggles establish is an elite one. A community of politicians and press editorial boards may not necessarily be the one an oppositional lesbian and gay movement wishes to build, particularly when the wider public continues to maintain a simultaneous belief in the 'unnaturalness' of homosexuality. Just as we must ask 'what subjects', we must also ask what or whose 'community' are we talking about?²⁴

One might also ask, how deep are these understandings? At what point do "those with power" stop "listening" (Minow, 1990:297) (assuming they started)? There is reason to suggest that "dialogue" (Minow, 1990:296) (assuming there was one) breaks down as soon as rights are given concrete meaning. Whilst a majority of Canadians support 'equal rights' for lesbians and gay men, it is unlikely that this 'community' will exist once these rights are seen

²⁴ This struggle also can be seen to have exacerbated a divide between urban and rural communities, strengthening each, against each other.

to be operationalised in adoption and fostering procedures, in alternative insemination policies, in affirmative action programmes, and so on. Practical issues such as these are often shifted to the margins when rights rhetoric is deployed.

In interviews, Don Hutchinson, Judy Anderson, and Jim Sclater, three New Christian Right activists, each expressed the opinion that lesbians and gay men deserved 'basic human rights'. However, when pressed, they were largely unable to specify exactly what kinds of rights they supported. Furthermore, each also approved, in principle, of human rights codes. However, in conversation with me, they clearly did not accept the ways in which the codes had been used; in other words, they expressed agreement with 'human rights' in the abstract, but did not wish to see any actual change in the lives of human rights beneficiaries.²⁵ There seems little advantage to creating 'shared understandings' at such abstract levels. Indeed, one could argue that rights rhetoric and legal frameworks actually inhibit serious dialogue (see also Milner, 1986:670) - this certainly seems to have been the case with Bill 7 where concrete issues were only discussed in order to reassure

²⁵ It could also be argued that the Charter, and perceptions of its 'misuse by special interest groups', has resulted in the de-legitimising of human rights codes as these are increasingly identified with the 'new selfish rights seekers'.

the heterosexual public that the Human Rights Code amendment would have no effect upon them.²⁶

Furthermore, Bill 7 demonstrates that the New Christian Right may have succeeded in building their own interpretive community. There is little evidence that each community engaged with each other in any meaningful way, nor is there any reason to think that they would. As I have argued, it is dubious whether those who respond positively to a general call for 'lesbian and gay rights', whilst maintaining disgust with homosexual expressions, are actually being gathered into a 'community' at all. Simply because rights rhetoric is powerful, and tends to get the best response, does not mean that anything terribly significant has happened. This may also be the case with the lesbian and gay 'community' as well. It could be argued that, as in Milner's (1986) 'patients' families' example, a sense of 'communal identity' was partly forged through the use of rights rhetoric. However, in the previous chapter I suggested that, perhaps, apolitical lesbians and gay men were only being 'gathered into a community' on the basis of narrow self-interest, and not with any broader kind of feminist, socialist, or anti-racist politics in mind. This too may not be something to applaud.

²⁶ See Chapter 3.

Other rights-defenders, and I include here theorists such as Patricia Williams (1987) and Elizabeth Schneider (1986), have suggested that, for 'Black' people and 'women' in the United States, the expression of demands in the form of rights, the use of 'rights rhetoric', has been empowering and self-affirming. Rights claims, for Williams (1987), are important symbolic expressions for those who have historically been denied 'self'-ownership (see also Matsuda, 1987; R. Williams, 1987). Interestingly, many of the writers making such a claim were active themselves within social movements and, thus, speak from their own senses/feelings about how that experience affected them and their colleagues. Such a perspective is meant to be a corrective to the perceived excessive negativity of the CLS and marxist 'rights critique'. bell hooks, speaking in a different context, has written that "the civil rights movement made it possible for me to be talking" (1991:219).

Despite my own, previously expressed, difficulties with the left-wing critique of law/rights/litigation, I would nonetheless question to what extent these 'rights defenders' have responded to the substance of the critique. It is not enough to simply say that rights assertion is 'self-affirming'. One must ask, what 'self' are we talking about? And, who is doing the 'talking' on our behalf? The lesbian and gay 'self' publicly expressed through struggles like Bill 7 is largely the construct of liberal medical discourse - the abnormal member of an immutable sexual

minority who deserves tolerance and protection, rather than repression and discrimination. As I suggested in Chapter 3, I do not believe that this 'subject' is one to celebrate unquestioningly.

D. Rights as Facilitative of Mobilisation and Communication: Case Studies

In this section, I wish to consider Bill 7 and Mossop to explore the specific effects of legal struggle in these examples, particularly with respect to issues of mobilisation and communication. It could be argued, for example, that Bill 7 mobilised the 'pro-family' movement more effectively than it did the lesbian and gay. Certainly, the Coalition For Family Values was able to initiate a greater letter-writing and phone campaign, and succeeded in having the amendment discussed across a network of conservative churches. Furthermore, as I showed in the last chapter, their statements were given ample publicity by politicians during debate, and by the media. The CFV's leader, the Rev. Hudson Hilsden, became a prominent spokesperson for the anti-amendment lobby, indeed of all social movement actors his individual role was most visible.

This was not the case for the 'pro' campaign. Whilst Chris Bearchell contends that lesbian and gay communities were mobilised as well (interview), it is difficult to

argue that this occurred to the same extent at the grassroots.²⁷ At the same time, I have suggested that feminist and radical gay analyses of sexuality were not publicly communicated. In these respects then, the anti-amendment campaign was more 'successful', despite losing the short-term battle. However, I have also suggested that the CFV's campaign backfired. Whilst their words made it into print, this often occurred within a critical context which undermined their authority. Thus, the illiberal CFV contributions had little practical effect upon shifting the terms of debate.

Other effects were shared by the two movements. For example, each gained valuable experience, established provincial networks, and forged links between formal organisations and their constituencies. Both the CFV and CGRO had some success in politicising previously inactive sympathisers. And each established ties with other social movements and organisations, although CGRO was, arguably, more successful at linking with a wider range of interests, partly because CGRO was, unlike the CFV, a single, formal entity with a defined set of goals and practices.

For CGRO and its constituency, the Bill 7 'victory' was, on one level, empowering and strengthening. However, losses often have the effect of retrenching social

²⁷ For example, MPPs received far more phone calls, letters, and petitions from CFV supporters than from those in favour of the amendment.

movements, and further provide a stark 'enemy' upon which 'losers' can focus future battles. Bill 7 was only one instance of a conservative Christian 'gay rights' intervention; in subsequent years there have been many more.²⁸ 'Wins', on the other hand, can cause complacency, apathy, and the disintegration of coalitions that no longer have a clear purpose. With the important exception of AIDS activism, I would argue that Ontario's lesbian and gay communities have seldom been as collectively organised as with Bill 7.

I have thus far suggested areas in which the New Christian Right may have either surpassed or equalled the achievements of the lesbian and gay movement, irrespective of the amendment's passage (much of this analysis might also apply to pro- and anti-choice struggles in the 1980s). I would argue that in only one area did CGRO establish a 'gain' that the CFV did not, and this was due to something quite unpredictable. During the Bill 7 campaign, important support for lesbian and gay equality was achieved both within the Liberal Party, and the NDP. The Coalition for Family Values, for its part, garnered substantial support from the Conservatives. However, the coming to power of a Liberal minority government shortly before Bill 7 signalled the end of over forty years of uninterrupted Tory reign in Ontario. Four years later, the Liberals were to be replaced by the first ever NDP government. Without these

²⁸ See Chapter 6.

political shifts, Bill 7 might never have passed, and the inroads made into established parties by lesbian and gay organisations rendered of no consequence. Such events are unpredictable 'chaos' phenomena that send contained theories and strategies awry.

Without engaging in too much repetition, I could make a similar set of arguments about the Mossop case. However, in this example, I would suggest that the lesbian and gay participants fared significantly better than their Christian activist counterparts. First, both shared, in contrast to Bill 7, a lack of mass mobilisation. Further, each, again, has gained valuable experience. The progressive EGALE coalition has perhaps fared better here, but only because they switched law firms and are now represented by counsel committed to achieving as much social movement "empowerment" as possible (Brodsky, interview).

EGALE has arguably achieved a higher level of networking; paradoxically, this was a direct result of federal funding.²⁹

And, if we compare the experiences of Karen Andrews, Brian Mossop and Ken Popert, with that of Judy Anderson of REAL Women, the former feel that they have far more successfully communicated their sexual politics to the public. In

²⁹ See discussion of Court Challenges Programme, earlier in this chapter.

contrast to the Bill 7 episode, where the CFV had the only visible spokesperson on the public stage, these instances of litigation have provided lesbians and gay men with opportunities to speak on behalf of their communities.

However, this is, of course, not unproblematic. Just as the Rev. Hilsden may not have at all times spoken on behalf of the Ontario Conference of Catholic Bishops during Bill 7,³⁰ so too it may be that the lesbians and gay men the media select as newsworthy do not represent at all the diverse interests, identities, values, and politics of lesbian and gay communities.

The fact that a lesbian's picture is on the front page of the Toronto Star says little about who she is politically, or whether lesbian communities appreciate her words.

I am suggesting, then, that whilst Bill 7 politicised and mobilised lesbian and gay communities, there was no concurrent effect of communicating a progressive sexual politics to that or any other group of people. And, whilst the Mossop litigation has provided a platform for individuals to speak out about sexuality, and organisational leaders to network, it has not acted as a catalyst for wider mobilisation. At the same time, the conservative Christian countermovement has achieved its own, related successes. It would thus appear that both

³⁰ See Chapter 3.

rights-critics and rights-defenders have had their fears and hopes realised.

Finally, it is important to remember that political mobilisation can occur at an individual level, and that individuals are what make up 'movements'. Take, for example, the experience of Karen Thompson, whose 7 year long battle for legal guardianship over Sharon Kowalski, her brain-injured partner, became a key symbol in the fight for lesbian and gay equality in the United States (see Thompson and Andrzejewski, 1988). In writing about her experiences as a closeted lesbian in 'small-town America', Thompson explains how her life was irrevocably changed, and radicalised, through her attempts to have the courts recognise her, rather than Kowalski's parents, as the most suitable legal guardian. Towards the end of her largely autobiographical book, Thompson writes a symbolic letter to the hospitalised lover that she has not been allowed to visit for many years. In it, she expresses some of the effects her legal battles have had upon her own political development.

I want you to understand how fighting for our right to live our own lives and make our decisions has transformed me from the conservative, private person you knew into an activist and feminist. Activist and feminist: probably you know more than anybody how these words used to frighten me. I see that same fear in other people, who are more afraid of me as an activist and feminist than as a lesbian. Mom told me last spring, "I know you love Sharon and I understand that you want to bring her home. But why do you have to be the Grand Marshall in the New York City Gay Pride Parade?". She seemed worried that if I went too far, if I was too

visible and outspoken, I would get hurt. But I know now that I have suffered more because of my silence.

Sharon, I feel the pain of our separation every day. Since I couldn't be with you, I had to do something with my rage or it would have destroyed me. I decided to speak out and work for positive change to come out of all you and I have suffered - all you have suffered, Sharon. Our story has touched the hearts of thousands of people who will never be the same. If only you could know and feel the support we have received from all over the country, it might give you the courage to keep fighting. It might give you hope that we still have a future together.

I still want to win this case for us, but in fighting for us, I have also begun to feel the pain of others who have also experienced oppression. And I have learned about the connections between different forms of prejudice and the people who profit from others misery. I have learned how people with power can manipulate and twist 'facts' to blame those who are victims. I have experienced being called aggressive, crazy and vindictive when our rights were being violated and I sought to protect them.

I have watched people label you helpless and childlike in their efforts to take control of your life. I have discovered that people who are uncomfortable with differences make disabled people 'invisible' and keep them out of sight in order to avoid their own fears. I have seen how institutions have removed the rights of women, disabled people and others under the guise of 'for their own good'...

My commitment to you hasn't wavered, even though years have passed since I've seen you. If success means that you are free, than so far I have failed. But if success means that thousands of people have opened their minds or obtained legal protection as a result of our struggle, you and I have already made a difference in the world. Sharon, I will continue to fight for us and for all the others who have been or could be separated by this same injustice. And I hope and pray that some day we will be fighting side by side - that we'll have the chance for a love that shares all we've learned (1988:219-220).

Karen Thompson and Sharon Kowalski won their case in 1992, the court finally recognising their "family of affinity".³¹

E. Concluding Remarks

It may be a self-evident observation that we are critical of things we do not get much out of, and encouraged by things we do. In the area of labour law, for example, it is generally accepted that the Charter has not advanced the rights of workers; indeed, the courts have used the Charter to de-legitimise certain labour activities, such as secondary picketing, by not protecting them under Charter grounds. Various writers have noted and been critical of the capacity of the Charter to effect any positive change in the social conditions of working life (see Glasbeek and Mandel, 1984; Glasbeek, 1989a; Fudge and Glasbeek, 1992).

In addition, it would be difficult to argue that Charter litigation, and its attendant rights rhetoric, have assisted in the mobilisation of the working class, or in communicating class analyses to the wider public. At the same time, the courts have used the Charter to fill out the legal personality of corporations, giving them rights, religions, and so on. In very few ways, if any, has the

³¹ See 'Thompson and Kowalski win' (February 1992) Off Our Backs. Remember, also, the comments of Evelyn Gigantes during the Bill 7 debate: "There is no task that I have undertaken that has made me feel more radical than this one", Ontario Hansard, 25 November 1986, 3629.

Charter effected any erosion of corporate power or profit. Hence, the almost universal Charter denunciation by marxist legal theorists.

On the other hand, a majority of feminist lawyers clearly view the Charter's advent as a good thing for women. Whilst some academics, notably those writing within a marxist tradition, remain critical in this area as well, most others are 'cautiously optimistic'³² - not only about results, but, as Gwen Brodsky argued above, with the capacity of Charter litigation to mobilise social movements, and open up avenues of communication, not only between movements and 'the public', but also between movements themselves. Many activists within lesbian and gay movements agree.

No doubt, if cases involving complaints of sex discrimination were decided differently, if feminists felt they were not getting anywhere with Charter litigation, the overall assessment would be quite different. Conversely, as Judy Anderson of REAL Women remarked, under different circumstances, should REAL Women perceive cases to be going its way, they might not be offering criticisms "so loudly" (interview).

³² Gwen Brodsky describes herself as a "thoughtful realist" (personal communication to author). See also Brodsky and Day (1989) where the authors, whilst critical of many aspects of the Charter, nevertheless see in it the promise of better things.

As I argued at the beginning of this chapter, the debate is not so much about rights, or charters, or codes, but about underlying political analyses and visions and about who has power to define the terms of equality. For socialists, it is not the Charter that is the problem, but the prevailing liberal ideology of courts and legislatures. This is how I read the point made by Joel Bakan (1991) in his reply to those who write about how the Charter could potentially be interpreted; quoting an old Yiddish aphorism Bakan notes, "if my grandmother had wheels she would have been a trolleycar" (1991). Certainly, socialists could give rights documents any number of interpretations - unfortunately, the Charter is in different hands (see also Chapter 7).³³

However, it could also be argued that feminism, at least certain 'brands' of feminism, have colonised liberal ideology with much greater success than have marxist class perspectives. This would not be the case for all capitalist democracies, but it may well be true for Canada, where the state has been for some years, formally at least, a partisan player in feminist politics, providing funding, ministry resources, and making public statements about the need to combat women's oppression. How 'women' and 'oppression' have been defined are, without doubt, not to

³³ As I explain in Chapter 6, however, the New Christian Right would vehemently disagree with this statement. They argue the courts are controlled by socialist feminist gay rights advocates.

the satisfaction of many feminists (see T. Williams, 1990); nevertheless, the dominant definitions certainly owe more to the feminist movement than to, for example, REAL Women and its conservative Christian brethren, or even, indeed, to traditional liberal ideas of 'womanhood'.

To illustrate this more specifically, in the Mossop case, a strategic decision was made by the Salvation Army (who largely controlled the litigation for REAL Women et al.) not to argue the case as one about 'gay rights'. When interviewed, both Don Hutchinson, the Army's legal advisor, and Ian Binnie, the coalition's lawyer, consistently maintained that the case was about the definition of 'family' and not about 'gay rights'. Similarly, both Hutchinson and Judy Anderson, of REAL Women, repeated several times that they had no wish to "gay bash" or to be perceived as "gay bashers" (interviews). What can we take from this? First, it seems clear that some Christian activists feel that 'gay rights' has gained a certain institutional legitimacy; publicly, some conservative Christians have acknowledged that, at this point in time in Canada, it is not 'acceptable' to deny lesbians and gay men some ambiguously defined measure of 'human rights'. Indeed, the Salvation Army categorically did not wish to fight the Mossop case using rights rhetoric at all (Hutchinson and Binnie interviews). The impact of a 'culture of rights' has, thus, imposed constraints upon the expression of conservative Christian politics. Even within

the Bill 7 struggle, the Coalition For Family Values felt compelled to state it supported "basic rights and freedoms" for "homosexuals".³⁴

And, yet, at the same time, rights rhetoric can play a more positive role for the right. Helvacioğlu (1991) has argued that, in the United States, the New Christian Right has turned to a strategy of local protest in which rights rhetoric is increasingly deployed. Helvacioğlu (1991:121) suggests that this will prove profitable for conservative Christian activists, given the social power of rights claims and a constitutional history of protecting religious minorities.³⁵ In Canada, it seems evident that attempts to shock and appal Canadians with tales of homosexual depravity are increasingly unsuccessful. It thus seems probable that the Canadian NCR will soon learn to re-articulate its demands in a different register. However, will the same process occur for them as has occurred for their opponents? In other words, what will be the contradictory effects upon their social movement for conservative Christians deploying a politics of liberalism? And, how 'effective' might such strategies prove? As I explain in Chapter 5, conservative Christians prefer to

³⁴ Open letter from CFV to Fellow Ontarians, 4 October, 1986, Gay Archives of Canada.

³⁵ Taylor and Condit (1988) have shown how religious conservatives used equality discourse to their advantage in battles over the teaching of evolution in schools. See also Kaplan's study (1989) of Jehovah Witness struggles for civil rights.

constitute themselves as the 'moral majority'; however, by claiming their own 'rights', they implicitly accept the liberal paradigm which constitutes them as a 'minority' in need of 'protection'.

In the case of lesbian and gay rights claims in Canada, in the 1980s, the relative strength of the lesbian and gay rights movement, and its support from other movements, meant that rights-related law reform strategies were viewed by participants as having been largely successful, even when actual litigation was not. How lasting, however, are these effects? If, as Fudge (1989) and Milner (1986) have argued, rights rhetoric inhibits consideration of substantive political issues, and is capable of being used to advantage by any social group in a specific instance, the gains won may easily be eroded. The experience of abortion rights in the U.S. is a case in point, where the same state government can swing from liberalisation to criminalisation over a relatively short period of time.

Furthermore, human rights legislation is only one legal regime amongst many. Governments may enshrine lesbian and gay rights in one code, whilst at the same time ensuring the continued privileging of the heterosexual nuclear unit in family, tax, pensions, property, and other

areas of law.³⁶ Adding grounds to pre-existing human rights documents is relatively easy; giving those rights real meaning in terms of the distribution of resources is quite another. As I argued above, the support of 'the public' for lesbian and gay rights also erodes as specific demands are formulated. I have also suggested that demands for inclusion within pre-existing human rights frameworks are complicated by how the 'minority subject' is constructed within liberal equality discourse, that liberalism's hegemony in this area makes it nearly impossible to challenge prevailing 'norms' around gender and heterosexuality.

On the one hand, I agree with Brian Mossop and Ken Popert that 'rights' are not the issue. Rather, the agenda of lesbian and gay rights activists is to "get on the radio", "mobilise", and other such things, not acquire 'rights'. And, to a large and growing extent, rights claims and rhetoric have proved successful in this way for lesbians and gay men in Canada. Furthermore, Brian Mossop would disagree that he has been unable to discuss substantive issues. As I illustrated above, his litigation has allowed him the opportunity to appear on phone-in shows to talk about homosexuality and coming out, not 'rights'.

³⁶ This is, of course, the advantage of Charter-litigation, which provides an opportunity to challenge such legislation in the courts.

In the process of engaging in legal struggle, I would further argue that notions of normality, equality, rights, and so on do shift. This is evident in the Bill 7 story itself, where over a period of fifteen years the Coalition For Gay Rights in Ontario, and the lesbian and gay movement as a whole, achieved a significant impact upon defining the terms of human rights. It is not trite to make the observation that what you could say about lesbians and gay men 'publicly' fifteen years ago, you cannot as easily get away with saying now. This is important, and not something to be derided or dismissed.

Shifts in meaning over time (Gusfield, 1981), are also evident in other areas. Law initially offered male homosexuality no 'private' realm whatsoever. The Wolfenden reforms, won through the campaigning of early 'homophile rights' organisations, constructed a narrow arena in which homosexual (usually male) sex was to be de-criminalised. More recently, demands for lesbian and gay rights in the areas of adoption and fostering, reproductive technologies, and a whole host of other 'family sphere' areas, have confronted the liberal Wolfenden consensus (Cooper and Herman, 1991). The 'public/private' distinction is no as longer tenable - practically or conceptually.

The analyses and strategies adopted by lesbians and gay men in legal arenas are, to some extent, shaped by the activities of their formidable opponents. In the next two

chapters, I turn my attention to the movement leading the opposition to lesbian and gay legal equality in Canada - the New Christian Right (NCR). I have discussed some aspects of conservative Christian activism in these last two chapters. I now wish to deepen this analysis by first providing a detailed interpretation of this movement's conception of gender and sexuality (Chapter 5). I then consider the intervention of three NCR organisations in the Mossop case (Chapter 6). I conclude Chapter 6 by assessing the relative 'effectivity' of the NCR in Canada.

CHAPTER 5

"NORMALCY ON THE DEFENSIVE"¹:

NEW CHRISTIAN RIGHT SEXUAL POLITICS

A. Introductory Comments

In the 1980s, 90% of Canadians claimed a Protestant or Catholic religious identity.² Of these, approximately 7% could be described as 'born again' conservative, evangelical Protestants.³ Despite relatively small numbers, it is this latter constituency, together with conservative Catholics, that has provided the "army" (to use their terminology) in the fight against lesbian and gay equality. Leading this army are several organisations comprising Canada's New Christian Right (NCR), a social movement I consider below.

In this chapter, I have accorded a rather high degree of determinism to conservative Christian theology. By focusing upon the role that conservative Christianity plays in relation to lesbian and gay law reform I suggest that this theology lies 'at the root' of the most vocal opposition to lesbian and gay equality. This focus is not intended to suggest that other factors are not also important; rather, my aim is to counter-balance the

¹ From Dobson and Bauer (1991:223).

² 1981 Census data, cited in Bibby (1987:48).

³ Ibid., p.114.

majority of feminist analyses of the 'new right', which may mention, but tend not to explore or highlight, the impact of Christian beliefs.⁴ Yet it is New Christian Right activists who have led the opposition to the 'gay rights' struggles which form the substance of this thesis. For example, during the Bill 7 episode, the Coalition For Family Values was composed almost entirely of Christian organisations, whilst during legislative debates almost every MPP speaking against the amendment indicated their opposition was also based upon Christian tenets.⁵ In the Mossop case, as I go on to show in this and the following chapter, the key organisations fighting Mossop's claim were and are members of the New Christian Right.

To date, little detailed research on the NCR in Canada has been undertaken.⁶ Lorna Erwin (1988b), whose research

⁴ Eg: Dubinsky (1985); Luker (1984); Ginsburg (1984); De Hart (1991); Petchesky (1984:245). But see Erwin (1988b) and Klatch (1987).

⁵ See speeches of: McKessock, Ontario Hansard, 25 November 1986, 3629; Haggerty, Ibid., 3640; Johnson, 26 November 1986, 3668; Runciman, Ibid., 3673; Davis, Ibid., 3682; Barlow, Ibid., 3689; Pope, 1 December 1986, 3787; McCague, Ibid., 3795; Wiseman, Ibid., 3798; Leluk, 2 December 1986, 3836; Taylor, Ibid., 3841. Note that all of these politicians explicitly relied upon 'Christian morals', and/or discussed the dangers of 'secularisation'.

There is reason to believe that atheism is an important factor leading people to support lesbian and gay equality (Bibby, 1987:155).

⁶ Other than Lorna Erwin (1988a; 1988b), whose research I draw upon greatly, one of the few other sources on the Canadian NCR is Haiven's (1984) journalistic account. Barrett (1987) has written on the 'extreme' right in Canada, a movement also very much shaped by a sense of

provides one of the few sources, has shown that members of Canadian NCR organisations maintain an impressively coherent position on 'moral issues'. Furthermore, their membership is extremely homogenous, in social position and moral outlook. Ninety-four percent of the respondents to Lorna Erwin's 'pro-family movement' study named religion as one of the most important factors in their lives (Erwin, 1988b). An astounding 99 percent attend church at least once a week. This contrasts sharply with the 8 percent comparable figure in the general Canadian population.⁷ Over ninety percent expressed concerns about feminism and gay rights, identifying these movements as "serious threats" to the family (Erwin, 1988b).

The NCR membership is also extremely socially homogenous. The majority of respondents were relatively well-off, educated, middle-class professionals (Erwin, 1988b). This pattern is consistent with American research indicating that the stereotypical portrait of the evangelical Christian as a poorly-educated, rural southerner is far from the case these days. As Lechner (1990) has argued, NCR activists are very much 'modern subjects' reacting against the secularisation of the modernity which produced them.

religious destiny, but one I do not consider here.

⁷ Statistic given in A. Rauhala, 'Religion is key for anti-abortionists, study finds' Globe and Mail (2 April 1987).

At this point in time, Erwin's results constitute one of the few sources of knowledge on the Canadian New Christian Right. However, her data ought not to provide conclusions regarding the belief-systems of Canadian conservative Christians generally. For example, Reginald Bibby (1987), who has conducted the most comprehensive surveys of religious attitudes available in Canada, found that whilst conservative Christians did disproportionately disapprove of pre-marital sex, homosexuality, and communism,⁸ in contrast to the 90% of 'pro-family' organisation respondents who viewed gay rights as a "serious threat" (Erwin, 1988b) over 50% of conservative Christian individuals indicated to Bibby (1987) that they approved of gay rights. Bibby's studies also indicate that conservative Christians are no more (or less) racist than the general population, no less disapproving of 'working women', and no less in favour of universal rights to healthcare and adequate income than Canadians overall.⁹

⁸ A 1985 study revealed that, whilst Canadian's overall disapproval of pre-marital sex stands at 22%, conservative Christians disapprove at a rate of 61%. Similarly, the figures for homosexuality disapproval are comparatively 70% and 89%. Additionally, 73% of conservatives are "uneasy" at the thought of meeting a lesbian or gay man, compared to 62% of the national population. In all areas, those individuals professing agnostic or atheist positions were by far the least disapproving, see Bibby (1987).

⁹ However, they are considerably less concerned about poverty, unemployment, etc., listing drugs and pornography near the top of their 'social concerns agenda', Bibby (1987).

This chapter is about the Canadian New Christian Right, and not about conservative Christianity generally. I explore the sexual politics of three organisations active in the coalition legally known as 'REAL Women et. al.', who came together to adopt a strategy of legal intervention following the human rights tribunal's 'pro-gay rights' decision in Mossop (see Chapter 2). Individually, and then together, they chose to hire lawyers, apply for official intervenor status and, when this was granted, prepare legal submissions arguing against the tribunal's 'sociological' definition of family. Despite the differences between the individual organisations, and there are many, they are nonetheless united by their adherence to a profoundly conservative expression of Christianity.

Whilst the NCR addresses itself to a wide range of concerns and issues, for the purposes of this thesis I have directed my attention towards the question of how these organisations conceptualise gender and sexuality. By doing this, I hope to shed light, not only upon the movement forming the most significant opposition to lesbian and gay equality, but also, in turn, upon the politics of the lesbian and gay movement itself. For, as I elaborate in the conclusion to the next chapter, an understanding of, and familiarity with, the rhetorical terms and politics of the NCR assists in explaining lesbian and gay social struggle. Finally, this chapter provides a context and introduction to the following one, which explores how

'insider' sexual politics are translated into the language of law.

B. Background

[1] Theology

New Christian Right activists are, as I mentioned above, evangelical,¹⁰ conservative Christians. They are largely, although not exclusively, Protestant.¹¹ I use the phrase 'conservative Christianity' following Steve Bruce (1984:4-8), who suggests two primary characteristics distinguishing this faith. First, and perhaps foremost, is an insistence on the literal truth of the Bible (particularly the Gospels), a belief known as 'biblical inerrancy'. Whilst liberal Christians allow for the possibility of interpretation and the cultural construction of biblical meanings, conservatives find such a thought abhorrent. For them, each word is God's Truth.¹² Hence,

¹⁰ Within the sociology of religion literature, a distinction is sometimes made between 'evangelicals' and 'fundamentalists', see Ammerman (1991). This distinction is not important for my purposes, and I use the word 'evangelical' to mean proselytising or missionary.

¹¹ One of the distinguishing characteristics of this movement, what partly makes it, perhaps, 'new', has been the forging of a Christian alliance between Protestants and Catholics. Given the historical anti-Catholicism of conservative Protestantism, however, this has not been without conflict, see Wilcox and Gomez (1989-90).

¹² See also, Chandler (1984); Lienesch (1982). Chandler discusses how certain Truths are selected for observance, and others ignored.

for example, their efforts to compel the teaching of creationism in public schools (see La Follette, 1983; Peshkin, 1986; Rose, 1988).

Second, conservative Christians believe that the Bible prophesies the second coming of Christ and the arrival of the 'millennium' (not necessarily in that order). There are various versions of this scenario, more popularly known as Armageddon. Broadly, in order for Christ to reappear, the Jews must return to Palestine, whereupon the Beast and the Anti-Christ will engage in battle (the 'great tribulation'). Just before the battle begins, the saved Christians will be 'raptured' up from earth to meet Christ. Once the forces of darkness have all been eliminated, Christ and the 'saved' - now called saints - will return to reign on earth for 1,000 years (Chandler, 1984; Diamond, 1989).¹³

At various points, key figures have predicted the date upon which the 'great tribulation' would begin. For example, the creation of Israel was said to constitute 'the Jews' return', whilst 'the Beast' was represented by the Soviet Union (Diamond, 1989:131). Armageddon would thus begin with a nuclear attack (in modern scenarios) upon

¹³ There is some disagreement over whether Christians will reign for 1,000 years before or after the second coming. The majority of North American conservative Christians are pre-millennialists - meaning Christ returns first. This eschatology (belief about how the world will end) is known as dispensationalism.

Israel by the USSR (Chandler, 1984:43-4). In a different version, the Beast is represented by Arabs, Africans, Asians, and Russians, who first fight it out amongst themselves (again, in Israel). All Jews, with the exception of 144,000 who convert to Christianity,¹⁴ are killed (along with many other unsaved) in the process. As the 'saved' Christians are raptured away, the 144,000 converted Jews take on their missionary work as the final battle looms. Western civilisation, led by the Anti-Christ, meets the Asian Beast, led by China, and all-out destruction ensues. Eventually, Christ and the raptured army of saints descend to usher in the millennium.¹⁵

Conservative Christian eschatology informs many of the political positions adopted by the NCR movement. For example, the American NCR's enthusiastic support for Israel, particularly in light of continued NCR antisemitism (Bruce, 1990), makes little sense without an understanding of the role Jewish people play in Armageddon. Similarly, the NCR's pro-defence stance is linked to the pre-ordained role the United States is destined to play in leading Western forces against the Beast from the East. However, it is also important to recognise that theology is not, despite NCR protestations, a static, unchanging world-

¹⁴ 12,000 for each of the 12 tribes of Israel - see Revelations:7:4-8.

¹⁵ This version is put forth by Hal Lindsey in his book Late Great Planet Earth which has sold over 18 million copies, see Bruce (1990:87).

view. The assignment of different nations to play the Beast and Anti-Christ roles, and the construction of a dependency upon specific weapons technology, is a historically contingent process. Biblical inerrancy and dispensationalist eschatology, then, is the "religious lens" (Klatch, 1987) through which conservative Christians view the world.

[2] Politics

Before moving on to a consideration of the New Christian Right organisations involved in the Mossop challenge, I wish to broadly outline what could be considered the North American NCR 'platform'.¹⁶ Whilst different analysts emphasise particular constituents, the NCR agenda can be said to consist of the following positions: anti-abortion; anti-affirmative action; anti-communism; anti-feminism; anti-gun control; anti-lesbian/gay; anti-welfare; pro-defence; pro-family; pro-foreign intervention.¹⁷ Many, but not all, of these 'issue positions' overlap with a general New Right agenda; the

¹⁶ I can not here trace the history of the NCR's emergence, nor explain its organisation and structure. Two comprehensive accounts, which offer different assessments, are found in Steve Bruce, (1990); and Sara Diamond, (1989). The edited collection of Liebman and Wuthnow (1983) is also useful as is Allen Hunter's prescient analysis (1981). Jerome Himmelstein's (1990) book is more analytical than some others, and also considers the 'new right' as a whole.

¹⁷ See Bruce (1990); Chandler (1984); Diamond (1989); Hunter, (1981); Jorstad (1987); Lienesch (1982). Needless to say, NCR activists might choose to describe their political platform using different terminology.

American NCR was one of the most vocal proponents of the nuclear arms race, accompanied by strident anti-Soviet rhetoric (recall that both nuclear weapons and the USSR play key roles in the inevitable battles of Armageddon). Further, as Diamond (1989:147) has shown, NCR organisations have actively supported right-wing groups and even death squads in Central America, the Philippines, and Southern Africa. NCR leaders have been amongst the severest critics of welfare state programmes, including affirmative action policies.¹⁸ With some exceptions, the Canadian organisations I go on to discuss adopt most of these positions.

[3] Organisations

I have set out above the basic theological and political contours of the New Christian Right in North America. Now, I wish to localise this analysis, focusing upon specific organisations active in Canada today. I have chosen to examine three of these - the Salvation Army of

¹⁸ The relationship between some of these positions and foundational conservative theology is not always clear, indicating both the NCR's absorption of a general New Right agenda, and the distancing of NCR leaders from their constituency. For example, evangelical Christianity has, in the United States, a large Black following, particularly in the south. Many of the political positions adopted by NCR organisations and their leaders would by no means reflect the beliefs of this religious constituency. An inquiry into the relation between the New Right and the New Christian Right is beyond the scope of this thesis. Whilst there would be much agreement between the two, areas of conflict include the role of religion and ideas about civil liberties.

Canada, REAL Women, and Focus on the Family (Canada) Association. Each organisation is particularly active in anti-lesbian and gay initiatives; I have chosen them specifically for their involvement as legal intervenors in Mossop, a 'gay rights' case which plays a central role in this thesis.¹⁹ The organisations which comprise the Mossop coalition share the aspirations of their American cousins. Indeed, organisations such as Focus on the Family and REAL Women take their inspiration, and in the former case their funding, from similar American manifestations.²⁰ Furthermore, each of these organisations, like their American counterparts, are primarily urban-based and professionally-dominated. Whilst their politics very much embody a reaction against 'modernist thinking', their own leadership, strategies, and structures are products of the society they wish to transform (see Lechner, 1990).

¹⁹ In Chapter 2, I outline the background to this case and in Chapter 7 analyse its judgments. There are two other organisations intervening with these three: the Evangelical Fellowship of Canada, an umbrella organization to which most of the others belong, and the Pentecostal Assemblies of Canada, an association of Pentecostal churches with a long history in Canada. For reasons of time and space, I have not been able to devote attention to these two. In Chapter 6, I explain what it means to 'intervene' in litigation.

²⁰ The three other coalition members, however, are harder to place. The Pentecostal Assemblies, the Evangelical Fellowship, and the Salvation Army all have a long history, stretching back decades, even to the last century in the latter case. Their participation in the Mossop litigation can be seen to reflect the new agenda of old evangelical Christianity. Focus on the Family and Realwomen, on the other hand, are organisations with clear links to the New Right generally.

The Salvation Army

The Salvation Army, with a history of 'social purity' activism (Valverde, 1991), has a mission, among other things, to "preach the Gospel of Jesus Christ".²¹ According to Don Hutchinson, the Army's legal advisor and key figure in the NCR Mossop intervention,

The long term goal would be that the whole world come under the sway of Jesus Christ, I can't apologise for that...(interview)

Nevertheless, as I go on to show, the Army remains, to some extent, a reluctant member of the 'New Christian Right movement'. Salvationists share few non-family-related policies with other NCR organisations, and leaders wish to maintain the Army's identity as distinct from those with whom it joins in "short term coalitions" (Hutchinson interview).²²

Focus on the Family Association (Canada)

Focus on the Family Association (FFA), a branch of a much larger American Christian corporation, is a relative newcomer to the Canadian political scene. Focus' "statement of faith" reads:

We believe the Bible to be the only infallible, authoritative Word of God. We believe that there is only one God, eternally existent in three persons: Father, Son and Holy Spirit. We believe in the deity of our Lord Jesus Christ, in His

²¹ The Salvation Army Positional Statements, Canada and Bermuda Territory, 1990.

²² For historical information on the Army see Coutts (1974); Handy (1976); Valverde (1991). See also Submission of the Salvation Army to the Royal Commission on New Reproductive Technologies, January, 1991.

virgin Birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return to power and glory. We believe that for the salvation of lost and sinful man, regeneration by the Holy Spirit is absolutely essential....²³

The organisation's structures, resources, and strategies are modelled on FFA's American parent, which, in turn, emerged out of the explosion of 'new' Christian groups in the 1970s.²⁴ Focus on the Family advises parents and their children on how to maintain Christian life in a secular world,²⁵ and, increasingly, seeks to influence the public policy-making process.²⁶ The organisation publishes a wide variety of magazines geared to different audiences, and has established a network of radio stations across the continent.²⁷

²³ Focus on the Family, with Dr. James Dobson, Special Introductory Issue, 1990.

²⁴ FFA (U.S.), in addition to maintaining its telecommunications empire, operates the Washington-based Family Research Council, a right-wing think-tank.

²⁵ Books published include, Guiding Your Family in a Misguided World and How to Know God's Will.

²⁶ For example, in 1991 Focus urged the Canadian government to delay ratification of the United Nations Convention on the Rights of the Child as 'parental rights' were not recognised within it, see Letter from J. Sclater to Friends, FFA, 14 June 1991.

²⁷ See generally, Focus on the Family in Canada: Purpose and Services, Vancouver, 1991.

REAL Women of Canada

REAL Women is an all-Canadian organisation, formed in 1984 as part of a right-wing backlash to the perceived gains of those RW terms "radical feminists" (Anderson, interview; see also Erwin, 1988a). The organisation's activities consist predominantly of contesting every demand made by their feminist adversaries;²⁸ they have also maintained a vociferous opposition to lesbian and gay rights.²⁹

REAL Women is also an organisation of the New Christian Right, a connection often overlooked as the organisation itself chooses not to publicise this fact. Nevertheless, Lorna Erwin's (1988b) research, referred to above, indicates that conservative Christianity is the common bond of REAL Women supporters. Consider also, the words of Judy Anderson, current president of the organisation.

²⁸ REAL Women is against: publicly-funded feminism, pornography, liberal divorce laws, equal pay for women, publicly-provided universal childcare, and tax policies which are perceived to encourage family breakdown. They are for: The Family, heterosexuality, marriage, motherhood and homemaking. See, for example, Position Papers, Pamphlet, REAL Women, n.d.; Who We Are: Brief to the Members of Parliament, 19 November 1985, REAL Women, Pub. No. 6; Pornography In Canada, Pamphlet, REAL Women, n.d.; Easy Divorce?, Pamphlet, REAL Women, n.d.; Equal Pay For Unequal Work, Pamphlet, REAL Women, n.d.; Child Care: Whose Responsibility, Pamphlet, REAL Women, n.d.; and various issues of REAL Women's newsletter Reality Up-Date.

²⁹ Laws Protecting Homosexuals or so-called "Sexual Orientation" Legislation: How it will affect Canadians, Pamphlet, REAL Women, 1985.

...[for] those of us who are Christians,³⁰ religious faith is very important...[but] one of the last things I'm going to do unless asked about it is talk about my faith...Christianity is low man on the totem pole, anyone can give a kick at Christianity and get away with it....an amazing amount of people would totally dismiss me, oh, she's just a Christian, she's just a fundamentalist, so, I don't go out there and talk about my faith - why would I? It's the whipping boy now...we're pretty careful about putting our faith on the front burner...we're all going to be pretty careful about where and when we talk in those terms. (interview)³¹

I do not consider these three organisations as a monolithic bloc; on the contrary, in the ensuing pages I have tried to distinguish their perspectives and politics as often as possible. Nevertheless, their vehement, oppositional position to lesbian and gay equality has facilitated their coming together as a 'legal coalition'; this opposition, rooted in their theology, is their common bond.

These, then, are the organisations which, together with the Pentecostal Assemblies of Canada, and the Evangelical Fellowship of Canada, make up the Mossop

³⁰ According to Erwin's data (1988b), all REAL Women members are Christian. Although the organisation claims to have Jewish and Muslim members, every one of the RW respondents to Erwin's survey identified themselves as Christian, and she has found no other evidence to substantiate RW's claim to religious diversity (Erwin, personal communication to author).

³¹ The significance of conservative Christianity in the lives of anti-feminist women is also noted by Jerome Himmelstein (1986) in his research into anti-ERA campaigns. He concludes that common religious beliefs and networks are what, more than anything else, such women share. See also Klatch (1987) and Erwin (1988).

coalition partners. In total, they present a rather comprehensive picture of right-wing 'moral (and economic) reform' politics in Canada today. Their leaderships are comprised of teachers, lawyers, psychologists, and other professionals, their memberships are relatively well-off, and deeply Christian.

C. Sexual Politics

I have chosen to draw out the four themes I consider most prevalent from my review of these organisations' texts.³² First, the conceptualisation of 'the family' as the fundamental, God-given unit of society, including a narrow and limited definition of what 'the family' can be. Intimately related to this is the NCR's construction of traditional gender roles as pre-ordained and absolutely imperative to social well-being. Second, the construction of homosexuality as sinful, diseased behaviour. The NCR's analysis is focused on the perceived activities of gay men; 'the lesbian' is almost completely absent from these discussions. Third, the depiction of a homosexual 'fifth column', an 'enemy within' conspiring to subvert the family using various techniques, including 'mind-control'. The furthering of the 'homosexual agenda' is related to the perceived power of the "secular humanist" (or "radical feminist") conspiracy generally. Fourth, the articulation

³² In Chapter 1 I discuss some of the problems relating to the selection and analysis of these 'texts'.

of children with risk, vulnerability, and moral health. Ultimately related to their views on Family, children are constituted as simultaneously pure, and extremely vulnerable to a process of corruption. The fear of losing children (to the secularist culture) lies deep within NCR discourses.³³

Underlying and emerging within these themes is the NCR's construction of sexuality itself, as something fluid, changeable, and vulnerable to persuasion. The organisations considered here take pains to deny any biological factors in producing homosexuality; indeed they attribute such explanations to gay rights opportunists seeking state protection. The NCR's perspective on sexuality is intimately related to its construction of gender. Male and female 'opposites', whose purpose is to procreate within marriage, are viewed as God-given Truths. NCR opposition to lesbian and gay equality cannot be understood without taking account of how this opposition is rooted in their desire to strengthen, model, and reproduce patriarchal gender relations. And, further, how the inspiration and authority for this desire is taken, literally, from the conservative Christian tradition.

³³ There is a fifth theme - that of rights versus responsibilities. I have discussed the politics of rights extensively in Chapter 4.

[1] 'The family'

Whilst coalition members give different emphases to other themes, all consistently reiterate the primacy of 'the family'.³⁴ According to Focus on the Family Association, "the family is a God-ordained institution and not just something that evolved in the human race".³⁵ "The family", states the Salvation Army, is "the primary social unit in society".³⁶ According to Judy Anderson, REAL Women president, the family is "the cornerstone, the basic building block of society" (interview).

Above all, what defines 'the family' is marriage. It is not an abstract conception of 'family' that is God-given.

...God's intention for mankind is that society should be ordered on the basis of lifelong, legally sanctioned, heterosexual unions. Such unions (marriage) lead to the formation of social units (families) which are essential to human personal development and therefore to the stability of the community.³⁷

Marriage is for life, that is God's Plan.

³⁴ Concern for 'the family' is not the sole province of conservative Christians. Other Christians, and many liberals generally, prioritise the family, and define it in various ways. What distinguishes the Christian conservatives are the perceived threats to the family, as well as a particularly exclusive definition of the unit, for discussion of conservative and liberal approaches to 'the family', see Cooper and Herman (1991).

³⁵ Letter from J.A. Sclater to Student, FFA, 20 March 1991.

³⁶ The Salvation Army Positional Statements, Canada and Bermuda Territory, 1990, p.18.

³⁷ The Salvation Army Positional Statements, Canada and Bermuda Territory, 1990, p.12.

We believe that the institution of marriage is a permanent, life-long relationship between a man and a woman, regardless of trials, sickness, financial reverses or emotional stresses that may ensue.³⁸

These ideas are consistently reiterated throughout the materials of REAL Women as well. As Erwin (1988b) has documented, the Canadian pro-family movement is fundamentally concerned with perceived threats to marriage, such as divorce, alcoholism, and, of course, homosexuality.

This rigid prescription of gender roles is characteristic of NCR family discourse generally.³⁹ The organisations of the Mossop coalition, for the most part, do not diverge from this pattern. According to Jim Sclater of Focus on the Family,

We know that God designed women to have a nurturing effect on children, male and female, we know that men are supposed to have not only a nurturing effect but to demonstrate the more aggressive role of the hunter, down through various civilisations...(interview)

In keeping with this, a Focus on the Family magazine directs women to "make the home a haven" for their

³⁸ Focus on the Family, with Dr. James Dobson, Special Introductory Issue, 1990, p.2.

³⁹ The theologically-based NCR prescription for family and gender roles is discussed in Diamond (1989:104-10); Erwin (1988); Hadden (1983); Hunter (1981:129-130); Jorstad (1987:79-80); Klatch (1987); Mathews and De Hart (1990:163-4 and Chapter 8). For a critical discussion of New Right conservative theory on gender, see David and Levitas (1988).

husbands, and be his "helpmate".⁴⁰ Erwin's (1988b) survey data shows that an overwhelming majority of REAL Women respondents believe that women should not undertake full-time employment, that motherhood has been devalued by feminism, and that liberal divorce laws and public child care provision undermine the family.⁴¹ Women and men, according to REAL Women, Focus on the Family, and the NCR generally, are not the same, and thus 'equality' is an inappropriate goal.⁴²

At the same time, however, the NCR explicitly urges Christian women to action; they are not to become completely 'family focused'. On the contrary, the publications of Focus and REAL Women exhort women to 'take up arms' in the struggle. One Focus magazine explains how you can "lobby Congress from your kitchen".⁴³ Dobson and Bauer (1990:261) do not idly state that "women are the key" to Christian battles. The REAL Women organisation's own

⁴⁰ M. Hodgson, '10 Ways Wives Can Say "I Love You"', Focus on the Family Magazine, June 1991, p.11.

⁴¹ I stress again that these are not necessarily the views of conservative Christians generally, just those of the organisational memberships.

⁴² See also, Reality Up-Date, November 1984, p.5 and the contributions of Laura McArthur and Gwen Landolt, two Canadian anti-feminists, to Rowland, ed. (1984). Once again, however, the Salvation Army is somewhat of an "odd 'man' out" in this debate as it tends not to directly engage in prescribing strict gender roles; indeed, the Army has been seen as a religious pioneer in breaking down work-related gender discrimination.

⁴³ V. 5(9) Citizen, 16 September 1991.

success is necessarily predicated upon the politicisation and activation of women cadres.⁴⁴

The NCR's construction of gender and the family is thus a contradictory one. On the one hand, underlying the NCR's anti-lesbian and gay agenda is a conception of God-ordained family structure, based on life-long marriage between a man and a woman, each of whom knows their place. At the same time, the 'subservient' woman is constituted through Christian rhetoric as a political actor, an important member of the 'army of saints'; her role being to assist in the preservation of the God-ordained family unit. I now wish to consider how the NCR represents homosexuality as a threat to 'The Family's' moral order.

[2] 'The homosexual'

Consider the following statement, released for public consumption by REAL Women during a 1986 federal parliamentary debate on lesbian and gay equality.

The homosexual seeks sex in the young age group. As he ages, when he begins to lose his attractiveness, he resorts to buying sex. That need has given rise to a subculture or [sic] prostitution of boys and younger men in inner cities...

⁴⁴ Studies of conservative Christian communities show how women negotiate power, rarely feeling completely 'powerless'. The women emphasise how, whilst gender roles are necessarily different and rigidly circumscribed, within the religious community neither is necessarily valued more highly than the other. See, for example, Ammerman (1987); Rose (1989); McNamara (1985).

The new findings on AIDS have destroyed the idea that the "gay rights" movement doesn't injure any one, and that what they do is their "own business". Homosexuals are a medical threat to their own sex, to those who require blood transfusions, to the promiscuous and their unknowing spouses. Homosexual food handlers are a frequent source of hepatitis outbreaks. Homosexual spouses expose their mates to a wide variety of diseases...The damage to homosexuals themselves goes far beyond their medical problems. Their conduct leads to devastating psychological consequences...

Many homosexuals, because they cannot procreate, must recruit - often the young. They promote recruiting "straights". With new legislation such seduction becomes permissable and acceptable.⁴⁵

One of the first notable aspects of this 'analysis' is that it is entirely male-focused. REAL Women conjures up the familiar spectre of the sick, depraved, predator, seeking out young boys to "buy" (presumably, 'the homosexual' is too ugly and disgusting to get sex for free) in order to engage in assorted perversions. The reader's mind is immediately filled with images of filth and rotting flesh, a kind of 'Dorian Gray' picture of ugliness and depravity. Their victims, in contrast, are innocent, pure, young boys.

These activities do not, however, take place on a purely individual level. A "subculture of prostitution" exists, implying a network of homosexual paedophilia in the heart of the "inner cities". Inner cities, themselves,

⁴⁵ Laws Protecting Homosexuals Or So-Called "Sexual Orientation" Legislation: How it will affect Canadians, Pamphlet, REAL Women, n.d.. The spectre of 'homosexual rights' was invoked in similar language by anti-feminist campaigners during the American ERA battles, see Mathews and De Hart (1990:166-7).

seem to represent the corruption of innocent (male) youth.⁴⁶ A logical chain of 'self-evident' assertions is established in the excerpt: homosexual men seek sex with young boys; as homosexuals age they "lose their attractiveness"; they then must "buy" sex with young boys; initiating the boys into a "culture of prostitution".

Related to REAL Women's construction of the predatory paedophile, is the organisation's implication that homosexuals are insinuating themselves into the fabric of traditional society. Their 'diseased tentacles' are grasping at young men and boys, not simply for sex, but in order to "recruit" them. Here, REAL Women evokes both anti-communist and antisemitic imagery. On the one hand, homosexuals seek recruits for an ever-expanding network of subversion. At the same time, their self-reproduction threatens a 'take over', a rat-like infestation and germ-spreading reminiscent of Nazi propaganda films.⁴⁷

Interestingly, homosexuals recruit because they "cannot procreate". Leaving aside the biological inaccuracies, REAL Women seems to be suggesting that heterosexuals do not need to recruit because they do procreate. Homosexuals require, RW argues, a 'pool' of other homosexuals to have sex with, hence they 'recruit',

⁴⁶ The portrayal of the 'corrupt inner city' also has deep racist implications in NCR ideology, see below.

⁴⁷ I discuss these links further below.

encouraging others to become homosexual - this is their means of reproduction. The implication that can be taken is that sexuality is political - it can be inculcated, like any other ideology. I discuss this point further, in relation to child sexuality, below.⁴⁸

Lesbians are notably absent from the discussion . It is, in this case, unlikely that "he" was meant to imply 'he and she'. The image is a familiar one, often evoked with respect to gay men.⁴⁹ More recently, as Ross (1988) has argued, REAL Women has increasingly directed its fury at lesbian feminists. One of the organisation's chief villains has been the federal Secretary of State Women's Programme, which has, from time to time, provided minimal funding to lesbian groups. REAL Women's efforts to stop this happening, and win its own grants, has encouraged the production of a specifically anti-lesbian rhetoric. However, Judy Anderson, when interviewed, explicitly

⁴⁸ The current president of REAL Women, Judy Anderson, took pains when interviewed to distance herself from the 'predatory paedophilia' theme. Speaking, as she put it "personally", Anderson does "not" see the abuse of children to be the key problem around homosexuality - "I don't see the general homosexual population going after kids like that". However, as the discussion continued, she began to associate gay attempts to reform the criminal law of consent with paedophilia. She noted that, as we spoke, her "tune was changing", and that she needed to "keep her eye on people".

⁴⁹ See Conservative comments during Bill 7 struggle, Chapter 3. See also, speech by Lord Halsbury during British parliamentary debate on sexuality, where lesbians are explicitly distinguished from the predatory, diseased 'homosexual', quoted in Cooper and Herman (1991).

excluded lesbians from any potential threat to children posed by homosexuality.

Themes of sex, disease, and depravity are most clearly expressed by Focus on the Family Association. Indeed, this organisation's fascination with the explicit details of homosexual sexual practices is profound. I will use two texts as illustration: an American Focus publication entitled The Homosexual Agenda, and my interview with Jim Sclater, National Director of Public Policy for the Canadian branch.

Brad Hayton's The Homosexual Agenda: Changing Your Community and Nation is primarily a community action manual for Christian activists. It is directed at individuals who have likely not as yet been involved in anti-gay campaigning, and Hayton offers helpful suggestions on drafting letters, influencing school boards, conducting meetings, and selecting appropriate prayers. The bulk of the manual contains a series of 'secular' arguments and 'facts' about homosexuality that activists can write in their letters, say on radio shows, and generally arm themselves with.

You know that homosexuality is wrong, and you believe it is wrong because the Bible says so. 'Because the Bible says so' is the bottom-line argument for the Christian. And yet using the Bible does not always convince your representative, city councilman, or friend of the soundness of your opinion. They probably don't believe in the Bible. You need other arguments

for your beliefs--arguments that they are more likely to hear and accept (9).⁵⁰

After briefly reviewing arguments about conflicting rights, Hayton narrows his discussion to the theme which dominates the book - disease. According to Hayton, "homosexuals have many more sexually transmitted diseases than heterosexuals" (12). Referring to several articles from reputable medical journals, Hayton argues that, "'Gay rights' laws merely protect and promote STDs...In the case of AIDS, it is a licence to kill" (12). Citing newspaper articles from 1979 and 1980, he states that, in San Francisco, the incidence of sexually transmitted diseases increased after the passage of gay rights laws.⁵¹ The footnotes to this section of the manual explicitly discuss syphilis, rectal infection, "gay bowel syndrome", gonorrhoea, herpes, and assorted other conditions to which 'homosexuals' are presumably prey. Again, the primary, almost the sole, object of scrutiny is the gay man, although this is rarely made explicit.

The manual then goes on to claim that 'homosexuals' molest children regularly, and, in a statement of 'fact' I have not seen reported elsewhere in NCR literature, that

⁵⁰ In the following chapter, I consider more closely the relationship between Christian, and other forms of knowledge.

⁵¹ Such laws barely existed during the period to which Hayton refers.

Out of all the mass murders in the U.S. over the past 17 years, homosexuals killed at least 68% of the victims, were implicated in at least 41% of the sets of crimes, committed 70% of the 10 worst murder sets, and were involved in five of the eight murder sets perpetrated by two or more people (15).

The authority for this claim is a publication entitled 'Murder, Violence and Homosexuality', published by the Institute for the Scientific Investigation of Sexuality, a right-wing Christian research facility.

Quickly, however, Hayton returns to his favourite theme - the specific sexual practices which 'cause' specific diseases. Male homosexuals have higher incidences of every possible disease than their heterosexual counterparts, including lice (16). Lesbians make an appearance here as well.

In comparison to heterosexual females, lesbians are 19 times more apt to have had syphilis, 2 times more apt to have had genital warts, 4 times more apt to have had scabies, 7 times more apt to have had an infection from vaginal contact, 29 times more apt to have had an oral infection from vaginal contact, and 12 times more apt to have ever had an oral infection from penile contact(16).

Again, the authority for this statement is a publication of the Institute for the Scientific Investigation of Sexuality (fn.12). The other reference for these 'facts' is to an article entitled, 'National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carnii Pneumonia in Homosexual Men' - one can not but doubt that information on 'lesbian diseases' would have been found here.

Hayton then moves on to detail the specific behaviours that 'cause' these conditions. Readers are advised that "only adults" should read on as "graphically detailed homosexual behaviour" is depicted. We are then presented with a series of homosexual sexual practices (some differentiation between the practices of men and women is occasionally made): "the insertion of the penis into the rectum of sex partners" causing "fecal material" to "enter through the urethra"; "inserting the tongue into or licking the anus"; "eating and/or rubbing themselves with the faeces of partners" ("homosexual men ingest, on the average, the fecal material of 23 different men per year"); "urinating or defecating on their partners"; "sodomasochism"; "handballing or fisting where the hand and arm are inserted into the anus up the rectum"; "drinking urine"; this is only a selection of what Hayton offers the reader as 'information' and 'argument' (16). Most of this section is not footnoted. Hayton continues by giving statistics on the number of sex partners "homosexuals" have in an average year (hundreds) (16), concluding that "sodomy laws protect communities and the nation from disease" (17).

A subsequent section on 'the homosexual agenda in education' begins by disputing the data about how many homosexuals there are in the U.S. (the 1 in 10 figure), but quickly lapses back into discussions about "anal intercourse, eating faeces, drinking urine, engaging in fisting, and pouring urine over one another" (22). Another

section, about 'domestic partnership' legislation, discusses a number of issues, including parental rights, role modelling, and so on, but again concludes with 'data' about child molestation, "fecal and urine ingestion, sado-masochism, fisting, fellatio, etc." (27). The manual's final section, '"Gay Pride' Demonstrations/Parades', once again details all these things, and the accompanying 'question and answer' sheet does so over again.

For Jim Sclater, public policy director of the Canadian Focus branch, homosexuals are typical of an "everything goes" society, that has extended "sexual licence" well beyond acceptable limits. "You wouldn't believe", Sclater constantly repeated, "what these people get up to" (interview).

...homosexuality is destructive of the image of god that was put into the person and is medically destructive. My own doctor, years ago, said that if anybody were to see the wreckage of human flesh that comes into his office as a result of homosexual, particularly male, practices they wouldn't be very impressed with it as a lifestyle...it's a chemical addiction, any sexual activity generates that chemical and people don't want to go for long without it...they need another hit...

...we agree that any human being should have housing, but I'll tell ya some of the homosexual practices that take place in housing, it would be hard to be on the side of the tenants...I can't even talk about some of the stuff these landlords have to put up with...(Sclater, interview)

Sclater's focus on the health aspects of homosexual behaviour is typical of the organisation which has, strategically, chosen to develop this line of argument instead of the deeper biblical prohibitions which shape

their selection of authoritative 'scientific data'. It was Sclater who gladly provided me with a copy of Brad Hayton's The Homosexual Agenda.

I have presented the perspective of Focus on the Family Association in some detail for two key reasons, first, as an illustration of a predominant theme in NCR literature - that of homosexual disease and depravity. Various writers have considered how sexuality and the body have been conceived and regulated in different historical periods; the articulation of sex with disease, death, cities, and sin is not new.⁵² More recently, much theoretical work has been done on the cultural production of a specifically AIDS-related medical-moral discourse.⁵³ For many conservative Christians, AIDS was a portent, a sign of the great tribulation to come (Palmer, 1990). In the popular, and particularly the Christian, imagination AIDS has signified the revenge of God, the contamination of the race, and the pollution of the nation. AIDS-inspired rhetoric of disease and blood has provided a modern expression of old metaphors (Gilman, 1985, 1988; Sontag, 1988).⁵⁴

⁵² See Foucault (1976); Weeks (1981); Mort (1987); Walkowitz (1980); Valverde (1991).

⁵³ Altman (1986); Patton (1985, 1990); Crimp, ed. (1988); Sontag (1988); Williamson (1989).

⁵⁴ Interestingly, the recent texts of Focus on the Family, REAL Women and other similar organisations, are not AIDS-obsessed. Whilst HIV remains an important symbol of the consequences of homosexual activity, other illnesses, infections, and disease syndromes play an equally important

The New Christian Right has available to it Christianity's historical construction of devils, of which 'Jews' form the first, and forever recurring, leitmotif. Within different historical periods, this 'enemy' also takes other forms - witches, communists, homosexuals, and so on.⁵⁵ Often, adversaries display characteristics common to several Christian devils; for example, the association of Jewish men with effeminacy, or the articulation of communists with homosexuals and Jews during the McCarthy witch-hunts. Indeed, much of the rhetoric deployed by the NCR against 'homosexuals' (and communists before them) is directly traceable to Christian antisemitic discourses. As Mosse (1985) and Gilman (1985, 1988) have shown, Jews were historically associated with disease, corruption, child abuse, madness, criminality, filth, sexual degeneracy, and urban decay (among other things).⁵⁶

Within the Christian tradition, the power of 'devil construction' is immense. It binds Christian communities

discursive role.

⁵⁵ See re historical Christian anti-communism: Speer (1984) and Wilcox (1987-88). See re articulation of communism with homosexuality, L. Edelman (1992); D'Emilio (1989); Faderman (1991), and re homosexuality and anti-semitism, Mosse (1985) and Gilman (1985, 1988).

⁵⁶ In Canada, a central Christian 'devil' has been Henry Morgentaler, the Jewish doctor who pioneered abortion practice and services. He has played the historical role of 'Jewish baby killer', and his experience as a Holocaust survivor has also played a complex role within anti-choice rhetoric.

together in a common purpose; in addition, as Murray Edelman (1988:68-87) has noted, the identification of "enemies" is central to the self-identities of those pointing the finger. Just as there can be no 'saved' if there are no 'unsaved', the 'diseased, depraved homosexual' is a necessary figure for the self-constitution of morally pure, Christian soldiers.⁵⁷

New Christian Right activists are no doubt aware of the resonances this rhetoric has within collective consciousness; whilst the authors of these texts no doubt 'believe' their own claims, Hayton, Sclater, and others also explicitly acknowledge that their deployment and re-articulation of this 'old' discourse is strategic. They perceive it as a way of communicating, a language to convey their politics to a wider audience.

In addition to presenting this continuity of loathing, I have, in this section, also sought to show the extent to which lesbian and gay lives, or, more accurately, perceptions, speculations, and imaginings about lesbian and gay lives, play a pornographic role in NCR discourse. The relish with which these activities are related, and endlessly repeated, in graphic detail, complete with

⁵⁷ During the Bill 7 struggle, a Catholic anti-communist organisation produced a newsletter identifying homosexuals with communism and the destruction of a 'Christian Canada'. See 'Where is Canada Heading', Canadian Society for the Defense of Tradition, Family, and Property (January-February 1987).

explicit descriptions of various body fluids (and solids), reveals the ways in which, arguably, conservative Christians express their own sexual needs and fantasies, and in so doing, produce pornographic text.

This is not a novel point. Various writers have noted how, for example, the details of 'lesbian sex' are related by fascinated judges during lesbian custody decisions (eg: Eaton, 1991). Others have deconstructed the rape trial as a form of pornography for the attending male voyeurs (Smart, 1989). NCR authors, whilst seemingly intending to induce shocked horror in their audiences, at the same time provide their constituency with 'approved' pornography - objectifying, degrading, and explicitly sexualising lesbians and gay men in the process.

Alone amongst the three, the Salvation Army refrains from participating in this 'devil construction', perhaps because the Army's history has ensured that its perspective on 'the city' is a more sensitive one, attuned more to the social factors which shape individual behaviour. It has refused to become publicly embroiled in what, according to Don Hutchinson, their legal advisor, might be perceived as "gay bashing" (interview). The Army consistently reiterates the biblical prohibitions, and the Christian basis of their opposition to certain elements of the lesbian and gay rights agenda. Yet, images of debauchery, disease, orifices and their contents, and sex itself are

notably absent from their texts. The Salvation Army has thus chosen to join forces with organisations that engage in what even Hutchinson might agree is virulent "gay bashing".⁵⁸

[3] Secular humanism and the homosexual 'enemy within'

Nothing short of a great Civil War of Values rages today throughout North America. Two sides with vastly differing and incompatible worldviews are locked in a bitter conflict that permeates every level of society. Bloody battles are being fought on a thousand fronts, both inside and outside of government. Open any daily newspaper and you'll find accounts of the latest Gettysburg, Waterloo, Normandy, or Stalingrad.

Instead of fighting for territory or military conquest, however, the struggle now is for the hearts and minds of the people. It is a war over ideas. And someday soon, I believe, a winner will emerge and the loser will fade from memory (Dobson and Bauer, 1990:19-20) [emph.orig.].

The theme of anti-Christian conspiracy has a long history -from the betrayal of Jesus, to the more modern Protocols of the Elders of Zion, and continued in recent years through Cold War rhetoric. It is, of course, the 'devils', described above, who conspire together to further Satanic agendas. Conservative Christians, despite their relative religious hegemony and imperialist conquests, have created a self-culture of heroic resistance to

⁵⁸ It is my view, however, that Hutchinson and the Army, and the coalition's lawyers McCarthy Tetreault, remain uninformed (perhaps deliberately so) about Focus's politics, see Chapter 6.

conspiratorial attack - historically from Jews, Muslims, and communists, amongst others. For the NCR, the 'secular humanist conspiracy' is a central ideological tenet.⁵⁹ For evangelicals, secular humanists are any people who do not accept biblical truth and the divinity of Jesus (among other things) - thus, the phrase is not used solely to refer to atheists. Rather, secular humanists can be, and often are, other Christians - those who deny the literal truth of the bibles, 'revisionists' who re-interpret doctrine, and so on. They are, of course, anyone who seeks to upset god-given categories of gender and sexuality as well. In recent years, the chief villains have appeared as "radical feminists" and "homosexual activists".

A recent book by James Dobson (1990), the American founder of Focus on the Family, and co-authored with Gary Bauer, an ex-Reagan advisor, details the extent of the secular humanist conspiracy, and the role of the lesbian and gay movement within it. Following the Civil War of Values quote reproduced above, Dobson argues that Christian tradition and belief (upon which the United States was founded) have, in the last thirty years, come under increasing attack from a value-system advocating a "new morality" - namely, "secular humanism" - where

⁵⁹ For discussions see, Bruce (1990); Diamond (1989:84-5); Heinz (1983:134-5); Jorstad (1987:28-34). On the role of conspiracy theories generally, see Davis (1971).

"prohibitions dissolved, rules changed, restrictions faded, and guilt subsided" (Dobson and Bauer, 1990:20-21).

It would be inaccurate to call the social reorientation of American thought and behaviour a 'conspiracy' per se, because it was not centrally coordinated. No high level czars determined society's course in some mysterious smoke-filled room. On the other hand, we are convinced that those who despise the Judeo-Christian system of values - and there are many - worked on a hundred independent fronts to produce a common objective.

As the civil war grows more heated in recent years, they have laboured much more closely to accomplish their goals. Can there be any doubt that the ACLU, National Organisation for Women, the National Abortion Rights Action League, People for the American Way, political liberals, and others have joined forces to drive for final victory? (Dobson and Bauer, 1990:108-109) [emph.orig.]

Throughout the text, 'secular humanists' are also referred to as a "cultural elite" that has established itself in positions from which are produced cultural expressions that invade and destroy "the homeland" (Dobson and Bauer, 1990:43).

With continual propaganda injected into the culture, the centre finally caves in. Good people become afraid or unwilling to stand in front of what appears to be an on-rushing train. Tradition yields - the old beliefs recede. What was unacceptable and offensive becomes the norm (Dobson and Bauer, 1990:115-116).⁶⁰

In this way, Focus' activists identify, as does REAL Women, large urban centres, particularly those on each American coast, as sources of contagion. Nationalist and anti-

⁶⁰ One edition of Focus's political magazine was entirely devoted to media bias during an anti-abortion 'rescue' operation, see V.5(11) Citizen, 18 November 1991.

modernist rhetoric are mixed to tell a story of increasing moral crisis, intended to inspire Christians to action. However, the battle won't be easy.

While all of this is going on, many of us in the church go about our business and pretend not to notice. The great army of believers could still turn the tide of battle if it awakens in time, but thus far only a courageous minority has been willing to defend the beloved homeland with their lives (Dobson and Bauer, 1990:22-23).

The word "homeland" has familiar ethnocentric connotations within ideologies of nationalism;⁶¹ elsewhere in the book, not-so-subtle racist language and imagery is used when discussing 'the Black Family', drug use, and urban poverty (Dobson and Bauer, 1990:29). The word also conjures up the 'land of the home' - the family - for it is here, particularly in the realm of child and adolescent sexuality, that the authors perceive one of the greatest threats to the Christian mission. I pursue this further in a subsequent section.

In attempting to defend the "homeland", the realm of 'culture', as a terrain of ideological struggle, is identified as key. Dobson and Bauer's book contains an entire chapter devoted to 'The Battle Over Words'. "Words", they argue, "do matter, [they] are the currency of discourse" (1990:217). Words are the "bullets" of "war" used to "advance the modernist agenda" (Dobson and Bauer, 1990:218).

⁶¹ See generally, Mosse (1985); Parker et al., eds. (1992); Seidel and Gunther (1988).

More recently, and no doubt partially as a result of the decreasing significance of the 'Soviet threat', the NCR is focusing its energies and its fears upon the lesbian and gay movement, one of, in their view, the key players in the conspiracy.

Today there are few political and social movements as aggressive, powerful, or successful as 'gay rights' advocates. Homosexuality is no longer considered a dysfunction but rather an orientation or a 'sexual preference'. If you oppose homosexuality or condemn it from a moral perspective, you risk being labelled 'homophobic' - a 'sickness' described as a fear or loathing of homosexuality (Dobson and Bauer, 1990:107).

In the authors' view, the lesbian and gay movement has been tremendously successful linguistically. Their cultural advances in re-defining and re-interpreting traditional concepts have been enormous.

This brings us to yet another verbal phenomenon - the recreation of new words - new weapons to be used in the civil war. If homosexuality is not considered abnormal, something else called homophobia is. Homophobia is an abnormal fear of and revulsion to homosexuality. The word is routinely levelled at anyone who opposes the gay rights agenda. It is now commonly used in the leading newspapers in the country and by trendy talk show hosts...

This redefinition of an old word - homosexuality - and the creation of a new word - homophobia - is not a minor event or a mere curiosity. Through these semantic changes, normalcy is put on the defensive (1990:223).

Dobson and Bauer's analysis here is reminiscent of 'postmodern' approaches to social struggle, which emphasise the significance of language. Unlike many marxist critics, who minimise the significance of linguistic 'reforms' (see Chapter 4), these conservative Christians argue that

current social struggles are nothing more, nor less, than contests over meanings and interpretations. Thus, the 'success' of 'homosexual activists' has, for Dobson and Bauer, 'real', 'material' consequences.

In 'proving' the 'homosexual conspiracy', Focus on the Family Association points to the perceived infiltration of the "homosexual agenda" into schools, media, and government.⁶² In newsletters directed at their own readership, quoting heavily from American publications like Dobson and Bauer's book discussed above, the Canadian branch draws attention to an immediate and serious threat. Focus goes so far as to argue that "virtually all materials presented in the public school system endorse the gay and lesbian lifestyle as a legitimate option".⁶³ The organisation's president argues that a "conspiracy" exists to "separate the students totally from the values inculcated in their homes".⁶⁴ Focus's political magazine Citizen consistently links "homosexual activism" with

⁶² See, generally, 'How Homosexuals Push Their Agenda', V.5(6) Citizen, 17 June 1991.

⁶³ This infiltration has occurred ostensibly in a covert manner. Teachers have been the victims of "desensitisation techniques", including being "exposed to graphic depictions of perverted sexual acts" (Newsletter from Geoffrey Still, President, Focus on the Family to Friend, April 1991). Thus, the homosexual agenda has even infected teacher training. A newsletter quotes one teacher complaining of "psychological manipulation" during training classes (Ibid.). See also Heinz (1983); Rose (1989); and Cooper (1989) re the U.K..

⁶⁴ Ibid.

"radical feminism" - together these two currently pose the greatest conspiratorial threat.⁶⁵

The view that major institutions are run by a "cultural elite" is echoed by REAL Women's Judy Anderson. For this organisation, key conspirators are clearly identified as "radical feminists".

...feminism has a lot of clout politically these days, the media certainly supports feminism almost 100%...we can't even get our point of view into the media most of the time...CBC [Canadian Broadcasting Corporation] won't touch us with a ten-foot pole...Mossop has his cheerleaders in the media, 99% of the media are on his side...the CBC is just one left-wing, socialist, feminist point of view, newspapers are little better. (Anderson, interview)

"Feminist ideology" (Anderson, interview) has infiltrated into government and the courts as well. Thus, REAL Women attributes its public funding difficulties to the placement of "radical feminists" in key governmental positions.

...the Secretary of State's Women's Programme is mainly run by feminists...LEAF [Women's Legal Education and Action Fund] gets all the money, we're strapped for cash always...the radical feminists got \$11 million dollars from the Secretary of State last year, we got \$6,900...one ideology is given amazing amounts of government funding to promote their agenda through the courts and people like us are out in the cold...feminists have gotten control of funding

⁶⁵ See, for example, B. Mitchell, 'Radicals Intimidate Christians on Campus', V.5(10) Citizen, 21 October 1991.

Conspiracy and mind-control are not, however, themes stressed in FFA's public expressions. For example, a letter from Jim Sclater, FFA Policy Director, to a student requesting information, contains no allusions to civil war or conspiratorial infiltration (March, 1991). On the contrary, this letter, whilst describing the threat posed by the success of cases like Mossop, offers to lesbians and gay men a few words of sympathy and understanding.

at all sorts of levels and they're pretty keen to hold onto it...the Prime Minister's appointments secretary is in that network, his access is very much cut off to people like us... (Anderson, interview)⁶⁶

The courts, as well, have replaced legal analysis with "sociological treatises" best exemplified by the "feminist ideology" of Bertha Wilson (Anderson, interview).⁶⁷

I have to give the radical feminists credit, they saw all this, they were involved in bringing the Charter in, men lay down and put their legs in the air - said, okay, you can have what you want - they got section 15 in there behind closed doors, I have to give them credit politically, it has changed the face of society, they got into the seat of power and grabbed it (Anderson, interview)⁶⁸

For Anderson, "radical feminists" have achieved levels of power REAL Women members can only dream about. The membership's experiences with funding applications and news coverage have taken on a life of their own; "radical feminist" power is identified as the cause of the organisation's political marginalisation, media 'trashing', and legal losses. The "radical feminists" have been constructed as the primary enemy; during my interview with Judy Anderson, we were ostensibly discussing the Mossop case, however very little of Anderson's anger was directed

⁶⁶ See, also, Who We Are, REAL Women, n.d. and C. Hoy, 'Campbell panders to feminist forces' (11 November 1991) Law Times.

⁶⁷ Bertha Wilson was a Supreme Court Justice popularly identified as having 'feminist sympathies' (now retired).

⁶⁸ I consider REAL Women's view of law and the legal system more fully in the next chapter.

at the 'lesbian and gay rights movement'. For her, feminism and 'gay rights' seemed one and the same.

A number of LEAF lawyers are lesbians, they're free to be lesbians, but I think there's a bit of a conflict of interest with their cases, getting my tax dollars to intervene in something very close to their own backyard. (Anderson, interview)

Anderson seems only able to consider lesbian activism in the context of LEAF, an organisation which, along with the National Action Committee,⁶⁹ is one of REAL Women's chief "radical feminist" power-holders and conspirators (LEAF has never intervened and is not intervening in Mossop).

Focus on the Family, on the other hand, does not personalise the conspiratorial politics to such an extent. Perhaps because the organisation has a significant pastoral component, which REAL Women does not, and secure funding sources from its readership and sponsors, which REAL Women may not, Focus does not appear as personally threatened (as an organisation) by "secular humanism" as REAL Women does by "radical feminism". For FFA, the conspiracy's greatest threat is to children, and it is to that theme that I turn in the following section.

The Salvation Army is, once again, a relative non-contributor to the theme of conspiracy. Don Hutchinson, when interviewed, was careful not to imbue the federal

⁶⁹ The National Action Committee on the Status of Women is the Canadian national umbrella organisation of feminist groups (like the American NOW).

Justice Department with conspiratorial motivations with respect to its involvement in Mossop, and at no point did he indicate that the media or the courts were under the influence of a particular "cultural elite". Hutchinson did, however, express the view that it was publicly acceptable to vilify Christianity (I discuss this further in the following chapter). Furthermore, whilst not using the war terminology of Focus on the Family, Hutchinson nonetheless does believe that there are "two value systems in conflict" (interview). However, rather than suggesting conspiratorial theories as to why one is pre-eminent, he is more aware that lesbians and gay men feel equally unable to adequately influence public policy in their interests.

Unlike Anderson or Sclater, Hutchinson, speaking for the Salvation Army, is far more sensitive to how many others in society perceive Christianity - as a 'powerful oppressor' (see also Chapter 6). For Focus and REAL Women, the 'conspiracy' is powerful and deliberate, and often included within it are groups of people who themselves usually feel as marginalised, despised, and ignored as these evangelical Christians. Hutchinson is more willing to explicitly acknowledge this, going so far as to recognise that Brian Mossop's reasons for engaging in gay rights litigation are based on experiences Hutchinson himself has never had to "endure" (Hutchinson, interview). Having said this however, it should be remembered that Hutchinson's comments to me in an interview do not

necessarily represent the views of the Army's membership. For example, an editorial on the Mossop case in the Army's newsletter does appear to raise the spectre of a possible conspiracy between the 'homosexual agenda' and public institutions.⁷⁰

Whether the conspiracy is called "secular humanism", "radical feminism", or "homosexual activism", both Focus on the Family and REAL Women clearly believe that it dominates all the major social institutions; the marginalisation of their own perspective leaves them feeling, as Anderson put it, "down a dark hole" (interview). As is characteristic of those who believe there is only one Truth, most views or actions which do not support the tenets of conservative Christianity are taken as being indicative of the conspiracy's power.

In this thesis, I do not wish to investigate the truth or falsity of this perception; I do not think that conservative Christians lie when they describe the world they see. What is important is the role conspiracy theories play in social movement politics, and the particular continuities the NCR constructions have with Christian fears historically. The NCR's secular humanist, or radical feminist, conspiracy fulfils an important role: it finds the source of perceived problems in an

⁷⁰ See 'Commentary: What Happened to the Family', The War Cry, 27 May 1989, p.2.

identifiable 'enemy' (see M. Edelman, 1988), and proposes an all-out battle to the death as solution. NCR constituencies are thus (the leadership hopes) simultaneously terrified, mobilised, and activated. Concurrently, The Family, marriage, and gender distinctions are built up, buttressed, and fortified.

Indeed, The Family, the "homeland", increasingly becomes the bulwark, the 'last stand' against utter destruction. As 'the conspiracy' controls 'the state', only 'the family' can lead the battle. Like the economic new right, conservative Christians condemn 'big government'; for the latter movement, however, their condemnation is related to the state's perceived advancement of the secular humanist agenda, its intrusion into the family sphere, and its perceived usurpation of church and familial authority. In other words, a new right commitment to laissez-faire capitalism is only part of their motivation.

Fields (1991) has argued, drawing from Habermas (1987b), that the New Christian Right is a 'new' social movement, like many others, attempting to assert the values, structures, and traditions of civil society against encroaching state and professional domination. Such a perspective is helpful to understanding how the NCR associates lesbian and gay legal rights with state interference and the undermining of familial authority.

The advancement of lesbian and gay equality is articulated with other developments, such as desegregation and affirmative action, as part and parcel of government out of control, of state interference in the domains of church and family.⁷¹ For example, both Don Hutchinson and Judy Anderson, during the course of my separate interviews with them, discussed what they perceived to be the excessive politicisation of 'race relations'.⁷²

It is here, in the expression of a general 'anti-statist' politics, that conservative Christians meet the economic 'new right'. However, it would be misleading to suggest that the NCR is anti-statist per se. On the contrary, evangelicals desire nothing less than the establishment of a Christian society with individual behaviour governed by the perceived teachings of Jesus and the apostles. It is the secular state which they oppose, and, in the understanding that the Second Coming might be some way off, they have opted for the next best solution of asserting local autonomy and decrying state interference - all, in the name of the children.

⁷¹ During my interview with him, Don Hutchinson drew a diagram of three circles, representing this encroachment.

⁷² For a discussion of right-wing articulations of race, gender, and sexuality during anti-ERA campaigns, see Mathews and De Hart (1990:173-4, 224). Allen Hunter (1981) also discusses the racist content in New Right thinking.

[4] 'The child'

Late that evening after returning home from the ABC studios [after appearing on a programme about gay rights], I quietly slipped into each of my children's bedrooms to watch them as they slept. My wife, Carol, and I always performed this ritual when our children were very young, just as millions of other parents do. We would tiptoe in, pull up the covers, check for a fevered brow and just reassure ourselves they were alive and well.

But that night I was looking for a different kind of reassurance - one I couldn't find merely with my eyes or ears or touch. I wanted to know that the world my children would grow up in would still embrace and honour the love and commitment between a man and a woman united before God in marriage. I wanted to know that they could have their own children and raise them in a free society that knew the difference between virtue and vice, good and evil, right and wrong.

That night, more than ever, I realised that it wasn't just invisible microbes that threatened the health of my children and the next generation of Americans. Their futures, and our hopes and dreams, were also threatened by an invisible ideology that seemed each day to encroach upon our society, pushing aside the truths that have guided civilised men and women throughout the centuries.

No number of death threats, no amount of media criticism, no amount of pressure would stop me from fighting for these children, or for the millions of others who depend on us to leave them a legacy of freedom and hope (Gary Bauer, in Dobson and Bauer, 1990:118).

For the New Christian Right, the secular humanist conspiracy is directed at "the hearts and minds of children" (Dobson and Bauer, 1990). If 'they' can steal the children, 'they' will, by controlling the next generation, have won.

Children are the prize to the winners of the second great civil war. Those who control what young people are taught and what they experience

- what they see, hear, think, and believe - will determine the future course of the nation. Given that influence, the pre-dominant value system of an entire culture can be over-hauled in one generation, or certainly in two, by those with unlimited access to children (1990:35).

The hottest and most dangerous confrontation to date -and the battle that may well establish the eventual winner - is being fought over child and adolescent sexuality and the policies relevant to it. It is here that the secular humanists have made their most audacious invasion of the homeland (1990:43).

...child and adolescent sexuality are seen as critical to the survival of the Judeo-Christian ethic, and indeed, to the continuance of Western civilisation itself. We human beings are sexual creatures. God made us that way. We recognise our sex assignment as boys or girls from our earliest moments of self-awareness, and that identification will influence everything we do to the end of our lives...

It follows, then, that stability in society is dependent on the healthy expression of our sexual nature. If this energy within us is siphoned off in the pursuit of pleasure; if it is squandered in non-exclusive relationships; if it is perverted in same-sex activities, then the culture is deprived of the working, saving, sacrificing, caring, building, growing, reproducing units known as families.

Robbed of sexual standards, society will unravel like a ball of twine...(Dobson and Bauer, 1990:54-55).

Focus on the Family's founders here articulate child sexuality itself as the "homeland". Schools, day cares, virtually any publicly-funded institution become centres of anti-Christian indoctrination, encouraging, indeed compelling, children, specifically boys (although this is unstated), to 'spill their seed' in the pursuit of pleasure.

Dobson and Bauer take a different approach to the disease-ridden rhetoric of Brad Hayton (discussed earlier); monogamous heterosexual marriage is here represented as the lynch-pin of capitalism. Sexual regulation is essential to the reproduction of the workforce itself. Foucault's (1976) analysis of sexuality as a regulatory regime is here confirmed in the articulation of child (hetero)sexuality with economic prosperity and the need for a disciplined workforce.⁷³ However, what is, ultimately, "at stake" for NCR activists, "is nothing less than the faith of our children. Our ultimate objective in living must be the spiritual welfare of our sons and daughters" (Dobson and Bauer, 1990:53). Once again, the bottom-line fear is the loss of children from Christian belief.

The need to keep 'homosexuals' away from children is at the heart of much anti-lesbian and gay activity. The chief victim of the homosexual fifth column is 'the child'; this is a theme constantly recurring in conservative Christian discourse. Human rights protection will legitimise this sinister "seduction". Both Focus on the Family and REAL Women express profound fears about losing children to an alien culture. Underlying these fears is

⁷³ As Valverde (1991) has argued in her study of social purity movements in Canada, Christian conservatives do not advocate the wholesale repression of sexual expression; on the contrary, they seek to contain it within 'healthy' channels (see also Petchesky, 1984:263-4). Dobson himself is something of a sexual guru to Focus on the Family subscribers, he has authored a number of books purporting to advise married couples on improving their sex lives.

the view that children's sexuality hangs in the balance; without the 'right' influences, they will renounce 'God's design' (heterosexuality) in the pursuit of pleasure (homosexuality).

Children, above all, are innocent; however, their sexuality, while God-given, is, for reasons rarely explained (perhaps to do with temptation doctrine), seemingly easily capable of being corrupted. One of the 'secular' arguments that NCR activists consistently deploy is that of the need to 'model' appropriate gender behaviour. Jim Sclater, for example, argues,

We know that young guys have to see what a male looks like or they won't figure it out for themselves. There's a period, particularly for male adolescents, where they're not sure what direction they're going. We think it's important that families be constituted by a father and a mother. We know that God designed women to have a nurturing effect on children, male and female, we know that men are supposed to have not only a nurturing effect but to demonstrate the more aggressive role of the hunter, down through civilisations. Without that, that's the classic development of homosexuality where the mother is the main figure. That's been proven over and over and over again. Where the father is absent, even when he's present. That can be very confusing for a male child (interview).

The 'modelling' argument is presented constantly in NCR opinion;⁷⁴ I do not wish to discuss its finer points. What is interesting for my purposes, is the extent to which the fear of inappropriate modelling is rooted in a belief in the precariousness of childhood sexuality. Parents might

⁷⁴ See Cooper and Herman (1991) for its manifestation in British politics.

wake up one morning and find their children have been hijacked by homosexual body snatchers. They will then have to watch in agony as their child embarks on a life of unbelievable sexual degeneracy, probably culminating in their early death from AIDS.

REAL Women, as I have discussed, also puts forward the heterosexual, child or adult, as a person capable of being seduced, and thus not at all fixed in their sexuality. At the same time, the suggestion is made that homosexual behaviour, despite its assorted horrors, is indeed extremely seductive, and therefore desirable. The appeal of homosexuality, the implied 'once bitten forever smitten' logic, is evident. Despite articulating homosexuality with death and disease, the NCR paradoxically and simultaneously constitute it as pleasurable and addictive. Jim Sclater argues that people, particularly men, need restraining; too much "sexual licence" and too little Gospel leads men to pursue sexual pleasure at whatever cost (interview).

In contrast to nazis, neo-nazis, and fascists generally, the modern NCR tends not to attribute homosexuality to genetic causes.⁷⁵ To do so, given biblical

⁷⁵ It could be argued that the Salvation Army takes a different position, regarding the "origins of a homosexual orientation as a mystery"; however, according to them, some people are clearly "disposed" to homosexual behaviour and others are not (The Salvation Army Positional Statements, Canada and Bermuda Territory, 1990, p.13). This may partly account for why the 'fifth column' theme plays such a limited rhetorical role for Salvationists. Arguably, as the Army becomes more involved in NCR coalitions, these

prohibitions and punishments, might entail advocating practices such as sterilisation, imprisonment, or even death for lesbians and gay men. The mainstream NCR is distinguished from the extreme right by virtue of its relative acceptance of concepts of equality, universal citizenship, and rights. The organisations studied here are not overtly racist, in the sense of preaching race superiority (although they do express a strong element of anti-affirmative action backlash) and tend not to indulge in biological explanations for structured inequality (although other sections of the NCR may do so). Indeed, Judy Anderson, Don Hutchinson, and Jim Sclater all expressed, to varying degrees, their support for basic human rights, including those for lesbians and gay men.⁷⁶

NCR activists also express the view, as do many sexuality theorists, that homosexuality and heterosexuality are sets of practices, rather than innate essences. However, for the former, one set of practices is condemned by Scripture while the other is God's design. Judy

views may change. See also, the Salvation Army newsletter War Cry, 27 May, 1989, p.2. Note also, that the Army's head office in Britain publishes a more severe statement on homosexuality, describing it as an "innate tendency" in need of suppression, see 'Homosexuality', The Salvation Army - A Positional Statement, International Heritage Centre, London, n.d. When interviewed, however, Don Hutchinson appeared to contradict this opinion. In response to a question asking whether he agreed with the sexuality views of Jim Sclater, Hutchinson, whilst expressing some reservations, stated that "no one is born gay".

⁷⁶ I discuss in Chapter 4 the problems around defining what is meant by 'rights'.

Anderson argues that "sexual orientation" and "lifestyle" are two separate issues (interview).

I'm married, I've been attracted to other people in my seventeen years of marriage, I made a choice, I'm either true to my husband, and my vows - I make a choice...we're talking lifestyle (Anderson, interview).

For NCR activists, it must be difficult to imagine that children could possibly be born homosexual - that is not God's plan. God created male and female, to complement each other, and created heterosexual union through marriage as the forum through which this complementarity is to be expressed (Hutchinson, interview). For Don Hutchinson of the Army, and in contrast to the public utterances of Focus and REAL Women, the key issue is "what is and what is not sin" (interview). Whilst humans suffer recurring punishments as a result of sin, 'deformities' must be acknowledged as just that - indications of the fall from grace, not 'celebrated' in 'pride days' and condoned by the state.⁷⁷ Jim Sclater argues,

We all know that there is a huge spectrum of homosexual roles, let alone a spectrum of activity. There's the effeminate male, the classic concept of the homosexual, but that's only one tiny portion of it. Or the butch gal, or whatever - just one tiny segment of the lifestyle. All humans are on some spectrum between male and female, in birth certain hormonal things can create hermaphrodites. It is a spectrum, where you fit is partly determined by genetics or hormones, but there's no genetic marker or key that's ever been found that would dispose a person to gay or lesbian lifestyle.

⁷⁷ I am not concerned here with analysing possible 'illogicalities' in this formulation.

The hormonal thing has never been proven in humans.

Just as there are accidents in birth, not everyone is born perfectly or at the right end of the scale, the Christian answer to that is that all of creation is suffering under the Fall, we have fallen away from God's perfect design and the whole universe is suffering...homosexuality may occur in some...the Christian answer is if it occurs because they're too close to one end of the spectrum by hormonal causes or whatever, to us that's in the same category as someone being born with a clubfoot...it's not God's design (interview).

Those who may be somehow near the 'wrong' end of the sexuality spectrum, and who insist on living "the homosexual lifestyle", must therefore be prevented from proselytising their "lifestyle" to others, in the same way that 'we' would not allow people with "clubfeet" , or alcoholism, to encourage others to adopt their disability. Those needing the greatest protection are those with the most malleable sexual identities - children.

One way for the New Christian Right to offer such protection is to stem the tide of lesbian and gay legal equality. How successful have they been at doing this? In the following chapter, I explore the Canadian NCR's attempt to challenge 'gay rights' in the Mossop case. I consider the relationship between their 'insider' sexual politics and their public legal argumentation, and conclude the chapter by assessing 'NCR effectivity' at a broader level.

CHAPTER 6

THE SAINTS GO LITIGATING

This chapter explores the process by which the three Canadian organisations discussed previously, Focus on the Family, REAL Women, and the Salvation Army, expressed their sexual politics in the legal arena and, in particular, their attempt to intervene in Mossop. I review how the organisations of the REAL Women et al. (as it is 'legally' known) coalition came together as intervenors in the case, and explore the relationships between coalition members and their lawyers, and between the different members themselves. I also use interview material to consider how organisational leaderships perceive law, courts, and the Charter. The second section then explores the specific question of how the themes discussed in the previous chapter - God-given family structure, homosexual depravity, anti-Christian conspiracy, and vulnerable child sexuality - were expressed, or not, within the coalition's legal intervention. I conclude by considering the 'effectivity' of the New Christian Right in Canadian politics.

A. Courts, Lawyers, and the Legal Process

[1] Perceptions of law and the charter

As discussed in Chapter 5, evangelical Christians have never shied away from engaging in political struggle. On the contrary, influencing social policy has always been at the forefront of their agenda. Historically, such activism took place around a number of different issues. In the last decades of the twentieth century, their activities have centred on constructing counter-movements to those waged by socialists, feminists, antiracists, peace activists, and lesbian and gay communities - these are the new threats to 'Christian society'.

For conservative, evangelical Christians, social activism is justified theologically. In contrast to strict Calvinists for example, North American evangelicals do not believe in the concept of the 'elect' - that one's post-judgment status has already been decided. Saving themselves, others and society as a whole is absolutely necessary.

This is not the time to pull back and say that we seem to be relatively ineffective in our attempts and therefore we must 'leave the outcome to God'. I believe that He has called our organisations into being in order to speak effectively into our culture and to prayerfully put our best efforts into stemming the tide of anti-family ideals and material. May He strengthen all of us as we attempt to be faithful to that calling.¹

¹ Letter from James Sclater, Director of Public Policy, FFA, to 'Friends', 14 June 1991.

Political action is God's "calling", the very reason for the organisation's existence (see also Valverde, 1991). Where, however, does law reform fit in?

In the United States, the relationship between the NCR and legal processes is a contradictory one. Initially, the perceived 'liberal excesses' of the Warren and Burger Courts played a key role in motivating the NCR's activism, particularly its decision to focus on electoral politics. The litigation experiences of the NCR, for example around creationism or school prayer, were not positive ones. The 'legal system', far from being viewed as a friend, was perceived as being controlled by the secular humanist conspiracy. In 1981, a document produced by one of the foundational American NCR organisations, Religious Roundtable, in tones possibly reminiscent of rhetoric that one might imagine fuelled the medieval crusades, reflected the general view.

The born-again Ayatollahs of Paganism, enrobed as federal court judges, with unchecked power, in violation of the Constitution, have established their religion of Paganism upon us, imposing its barbarism and corruptions, demanding the modern materialist gods of consumerism and careerism be sated with children's blood.²

Yet gradually, the American NCR began to realise that they could influence the composition of the courts, wresting them away from the Godless "barbarians". The judicial appointment process, therefore, became a prime site of NCR activity, the goal being to fill the courts with

² Quoted in Jorstad (1987:34, see also 226-7).

conservative judges eager to find the 'original intent' of the constitutional 'Founding Fathers'.³

In contrast to the highly legalised culture of the United States, conservative Christians in Canada have been slow to mobilise around law-related issues. However, within an increasingly Charter-litigious society, this is quickly changing. In the mid-1980s, the National Citizens Coalition (NCC), a right-wing business lobby with ties to the conservative Christian movement, funded Charter litigants attempting to overturn progressive labour law. During the same period, the NCC, along with the Pentecostals, Real Women, and others, participated in the campaign against Bill 7 in Ontario.⁴ The NCR has also been moderately active in election-related activities.⁵

More recently, as lesbians and gay men increasingly engage in human rights litigation, under the statutory codes and the Charter, so too have the evangelicals explored the possibilities of legal intervention. At the

³ In American constitutional interpretation, a conservative judicial approach is usually noted by adherence to the doctrine of 'original intent', rather than the 'living tree' approach of liberal justices. The latter approach interprets the U.S. Constitution in light of modern developments and social change, whilst the former insists upon 'reading the minds' of its 18th century writers.

⁴ See Chapter 3.

⁵ For example, during the 1988 federal elections, NCR groups ranked candidates on their abortion stands, and publicly sought, and to a small extent succeeded, in having their chosen candidates elected.

1991 pro-family conference in Ottawa, a workshop was held on how to develop the newly incorporated 'Foundation For Legal Education and Justice', an umbrella body to fund and strategise around legal intervention.⁶ According to Jim Sclater, this organisation will be "less overtly Christian", and, in so being, will hope to attract the support and funding of other organisations that "do not necessarily agree with all of our family agenda" (interview).

In explaining their decision to litigate, NCR leaders point to the increasing use of Canadian courts by other interest groups seeking to further political agendas. Don Hutchinson argues,

We live in a very litigious society now, a lot of people are becoming more aware of their rights before the courts. A number of special interest groups have proceeded before the courts to seek changes in how certain issues are viewed which parliament might not have been prepared to grant. So too the church has become more aware that its positions can also be presented before the courts...a number of religious groups, and in this particular instance [the Mossop coalition] you could classify the groups as evangelical Christian groups, have gained a realisation that we have the ability to stand before the courts and make presentation in the same way that other special interest groups do, and try and preserve and promote our point of view. (interview)

More than the other organisations, REAL Women has identified participation in Charter litigation as a key campaigning strategy. Judy Anderson, president of REAL

⁶ Ottawa Conference on the Family, 1991, Agenda.

Women, argues that "courts are now the main avenue for social change since the Charter" (interview). However for Anderson, participation in litigation is hindered by the "radical feminists" who control the funding sources (interview). For example, the Court Challenges Programme, a federally-funded, arms-length body that awarded Charter litigation funds to applicant groups, refused REAL Women funding on the basis that the organisation sought to restrict, rather than enhance, equality. The Programme was, for Anderson, part of the "radical feminist" conspiracy: "all the people who administer the funds are quite partisan" (interview).⁷

REAL Women's construction of a bias in Charter-litigation funding is also found in various right-wing media commentaries.⁸ Recently, two Canadian political scientists co-authored a study which claims that a "court party" has arisen in Canada.⁹ They argue that left-wingers, feminists, and others with similar politics, have succeeded in obtaining federal funding in order to fuel social change

⁷ The Programme was cancelled subsequent to this interview, see discussion in Chapter 4.

⁸ See, for example, G. Koch, 'Rise of the Court Party', (18 November 1991) Western Report 10-11; I. Benson, 'Claims about LEAF popularity must be viewed with caution', 11-17 March 1991, Law Times; C. Hoy, 'Campbell Panders to feminist forces' (11-17 November 1991) Law Times. Copies of these articles were given to me by Judy Anderson.

⁹ See 'Rise of Court Party', Ibid.; A. Strachan, 'The hidden opposition', (11 January 1992) Globe and Mail. The authors of the study have written against 'equal opportunity' policies for many years, see, for example, Knopf (1985).

through the courts. The authors maintain that these forces, frustrated in their attempts to install a socialist government through democratic processes, have created their own political "court party". The conclusion of these academics, that democratic process is being fundamentally subverted by left-wing judicial activism, has provided welcome 'evidence' for the NCR, who have quoted liberally from the study.¹⁰

Partially as a result of this perceived bias, REAL Women views the Charter as an unqualified evil which they only argue about because they have to: "instead, we say, get rid of the Charter" (Anderson, interview). For Anderson, the Charter is undemocratic, providing "five

¹⁰ Eg: See note above. It is worth noting, again, that the 'left's' perception of the Charter and the courts is similarly critical, although for different reasons, see also Chapter 4.

I am simply presenting the views of the NCR here; not debating the issue. Whilst it is no doubt true that feminist groups receive far more in litigation funds than REAL Women, S.15 of the Charter ostensibly exists to assist "disadvantaged" groups seeking equality. Federal administrators decided that REAL Women did not meet this qualification, and, no doubt, given the intentions of the section, they were right. The Court Challenges Programme was not set up to assist battles between social movements with different societal visions; if it had been, then 'equality' might require the funding of REAL Women. Rather, the Programme was meant to assist "disadvantaged groups" seeking to challenge potentially discriminatory legislation. It is, therefore, assumed that the government will mount an effective defense of the legislation; however, the NCR has identified, in cases like Mossop, the government's failure to do this. If this is so, then the assumptions upon which Section 15, and the Court Challenges Programme, are based are undermined. This, however, is a different issue to REAL Women's not receiving 'equal' rights to Programme funds.

people" (a majority of the Supreme Court) with "no accountability to the public" the opportunity to "in one fell swoop change the whole force of Canadian jurisprudence and social norms" (interview). Echoing many of the Charter criticisms made by marxist legal academics (discussed in Chapter 4), Judy Anderson argues for "more grassroots participation" (interview). Anderson's comments are based upon her perception that the Supreme Court of Canada has adopted the "radical feminist" agenda. When asked whether, should the Court be staffed by judges more to her liking, she would still have the same views about the Charter she replied that whilst the process would continue to be undemocratic "if things were going our way we might not be saying it quite so loudly" (interview). Nevertheless, were it not for the funding problems, REAL Women would happily make litigation "one of our primary strategies" (Anderson, interview).

Don Hutchinson of the Salvation Army has a similar critique of Charter-based legal struggle, arguing that a 'rights-oriented' culture loses sight of the importance of social responsibility and the blessing of being granted privileges (interview).¹¹ However, for the Army, litigation is increasingly being seen as another way of expressing a political message. The Mossop coalition, Hutchinson argues, is a "wise investment", a form of "stewardship",

¹¹ I have discussed these views more fully in Chapter 4.

"what the Salvation Army does is invest in people's lives" (interview).

Law is one of the many ways to indicate your concern. Our primary concern is to share the gospel, in our words and in our deeds. That sharing and coming to positional statements on a number of issues on which there is a biblical perspective takes place in a number of different ways...lobbying the government...appearing before the courts...the Sunday morning Holiness meeting...providing soup to people commonly referred to as street people...ministering to teenagers. There are a number of varieties and a number of ways which we try to minister. Law is one of them. (Hutchinson, interview)

The Army now "budgets" for litigation and Hutchinson insists that no other area of Army service suffers as a result (Hutchinson, interview).¹²

Finally, it is worth noting that Brian Mossop's legal claim, while it may ultimately raise issues relevant to Charter adjudication at the Supreme Court, does not explicitly do so. His action, as I have discussed in Chapter 2, is under human rights legislation that pre-dates the Charter considerably. Nevertheless, Don Hutchinson, Judy Anderson, and other conservatives situate the Mossop case within a perceived modern 'rights claiming' culture, which, in their view, the Charter typifies.

¹² Hutchinson's comments echo a point I have made at various stages in this thesis and echoed by the work of Gusfield (1981). Social movements struggle on a number of fronts, some of which may even be incompatible with each other. Focus on the Family remains a primarily pastoral agency, and the Salvation Army remains predominantly a community social service. REAL Women, on the other hand, is almost entirely a political lobby.

These three NCR organisations all, to varying degrees and for diverse reasons, share the belief that we live in a overly rights-focused culture. Courts and judges are hopelessly biased against 'traditional morality'; the Charter (and, by implication, all human rights frameworks) has been a tremendously successful tool in the hands of 'the left'. Because of this, they are forced to participate in activist litigation in which they would not choose otherwise to engage.

[2] Creating the REAL Women et al. coalition

The impetus to form a Christian intervention coalition in Mossop came initially from Jim Sclater and Focus on the Family.¹³ Following the publication of the Tribunal decision in Mossop, and the indication that the Government would appeal, Focus decided the issue was significant, and that they, and others, should get involved in some way. Jim Sclater called the Justice Department and spoke to Barbara McIsaac, senior counsel on Mossop, who indicated, he states, that the "government didn't have much of a case" (interview). Focus, who believed that a strong argument against the re-definition of 'family' to include gay couples could surely be made, began to contact fellow Christian activists.

¹³ The following account is based upon interviews with Jim Sclater, Don Hutchinson, and Ian Binnie, coalition lawyer (with McCarthy Tetreault).

After discovering that a number of other organisations were already involved in legal interventions, and thus could not play a leading role in Mossop, Sclater, who had been referred to the prestigious Bay Street firm McCarthy Tetreault, decided that Focus's resources permitted them to act as instigator. Focus and REAL Women had worked together in the past, and were at that time involved in setting up the Legal Defense Fund; RW was thus a natural partner for Focus to contact. The Salvation Army became involved through McCarthy Tetreault; the firm was the Army's general counsel, and had relayed to them Focus's interest in Mossop. Eventually, the other two members, The Pentecostal Assemblies of Canada and the Evangelical Fellowship of Canada, both with active histories in opposing lesbian and gay equality, joined up as well. As various interviewees expressed it, activists wished to have a mix of organisations 'known' to the courts as intervenors (eg: REAL Women) but also with long, respectable histories (eg: the Salvation Army).

The intervening organisations never met as a group, although there was some phone contact between individual leaderships, and Focus and REAL Women met at their pro-family conference in the spring of 1991. Whilst Don Hutchinson of the Army stated he was "aware of the doctrinal beliefs of the other organisations" (interview), it was clear to me, in conversation, that his knowledge of

Focus on the Family, in particular, was extremely limited.¹⁴ He expressed his own, guarded reservations about the politics of REAL Women, commenting (off-tape) that "they were the ones we have the most problems with" (interview). It was, however, REAL Women's "faith" which provided, for Hutchinson, the key common ground (interview).

Despite not being able to meet and discuss the case, both Don Hutchinson and Jim Sclater expressed satisfaction with how McCarthy's was handling the matter. Hutchinson and Ian Binnie, counsel from McCarthy's, had worked together to ensure that the legal submissions did not engage in "gay bashing"; each took great pains to insist that the case had "nothing to do with gay rights" (Hutchinson, interview). Of all the organisations, then, it is the Salvation Army that played the most instrumental role vis a vis the legal submissions. Don Hutchinson felt that the factum was "a good reflection of our [ie: the Army's] position" (interview). Jim Sclater, on the other hand, acknowledged having very little input into the drafting of the factum, and neither did Judy Anderson (although neither expressed dissatisfaction) (interviews).

¹⁴ Interestingly, Ian Binnie, McCarthy's lawyer on the case, similarly knew very little about Focus on the Family. He noted, however, that the participation of the Salvation Army gave the entire coalition credibility with the courts which they might not otherwise have had (interview).

In contrast to the Egale et al. coalition,¹⁵ which was funded by the Court Challenges Programme (thereby confirming the NCR "court party" and conspiracy theses) the REAL Women et al. intervention was funded by the organisations themselves; McCarthy's has agreed a ceiling for each intervention (at the Federal Court, it was approximately \$17,000). According to Jim Sclater, primary funding comes from the Salvation Army, with the Pentecostals and the Evangelical Fellowship assuming a certain amount as well (Sclater, interview). Judy Anderson did not know how the litigation was being funded (interview). Don Hutchinson, of the Army, insisted that the Army's share was not being funded out of publicly raised monies; when pressed to say where the money came from, he suggested that sources included income from Army property and investments (interview), (clearly sources which were, at some point, raised through public donation or state subsidy).

Interestingly, then, the Salvation Army, a somewhat reluctant and anomalous member of Canada's New Christian Right, was the directing hand behind the submissions and provided, it seems, the bulk of the funding. Indeed, the Army, despite its divergence from much of the sexual ideology represented in the previous chapter, could be said

¹⁵ This is the coalition of progressive groups intervening on Mossop's behalf. See Chapter 2 for brief discussion of the social movement organisations involved in this coalition.

to be 'fronting' the litigation publicly. Their participation has contradictory implications. On the one hand, the Army's name, as Ian Binnie himself noted when interviewed, provided the coalition with public credibility they might not otherwise have had. The Army is well-known, and well-respected. Their reputation for a more 'caring' Christianity mutes the 'new right' politics of Focus and REAL Women. At the same time, their overt Christianity, in the context of the two other organisations not being 'known' as conservative evangelicals, risks the coalition itself being publicly considered as a group of 'Christian fundamentalists'.

For the Army itself, the contradictions ought to be more severe. Based on shared biblical understandings of homosexuality, they have joined with groups politically far to the right of themselves, funding and legitimising these others in the process. Don Hutchinson was sensitive about this, repeating that the coalition was a "short term thing" only, and that the Army had no desire to "gay bash" (interview). Nevertheless, their participation with the other organisations will no doubt have a more long term effect upon the Army's politics and future moral activism. Unfortunately, other than expressing vague reservations about REAL Women's politics (and indicating he knew very little about Focus's), Hutchinson was not willing to discuss this dilemma further.

B. The Process of Legal Translation

In this section, I consider the ways in which the sexual politics of Focus on the Family, REAL Women, and the Salvation Army, were expressed, or not, within the coalition's legal submissions in Mossop. In agreeing to intervene as one party, coalition members consented to representation by one law firm, and, whilst able to submit separate affidavits, to the presentation of a joint factum (statement of argument and authorities). The documents I refer to include: affidavits of organisational leaders and the Federal Court of Appeal factum.

The phenomenon of third party intervention is a relatively new one in Canada, achieving increasing prominence in the post-Charter era.¹⁶ In the United States, third party briefs filed by 'amicus curiae' (friend of the court) are common, and have been a significant form of social movement legal struggle in that country. In Canada, there is no 'right' to intervene. Applicants must establish, through submissions, that they possess specific skills and knowledge that will prove valuable to the court in rendering its decision in a particular matter. In practice, this burden may not be a heavy one (depending on the case), and it has become common-place, for example, for LEAF, the feminist legal action organisation, to intervene in significant cases affecting 'women's rights' (see

¹⁶ The process is a similar one to achieving 'standing'.

Razack, 1991). Such activities on the part of lesbian and gay organisations, and by the right in Canada, have been less noticeable (the latter has tended to fund individual litigants).

In Mossop, the NCR coalition thus had to achieve intervenor status before being able to make their argument to the court. The documents produced to enable this were affidavits from organisational leaders, and the Application For Leave to Intervene. The former establish the individual credentials and expertise of the coalition partners, the latter condenses the information and argument the coalition believes constitutes a unique and important contribution to the debate. Whilst, formally, each organisation must establish its own 'right' to intervene, for unknown organisations or those with dubious credentials, this will be facilitated by the involvement of well-known and well-respected groups, such as, in this case, the Salvation Army. Once having been granted status, the Application For Leave will form the basis of the factum - the submission that presents the coalition's argument to the court. I now go on to explore a selection of these materials.

**The Affidavit of Lt. Col. William Speck, Salvation Army of
Canada (in the Federal Court of Appeal)**

William Speck, the officer responsible for the Army's intervention before Don Hutchinson's involvement (Speck has since retired), purported in his affidavit to establish the basis for granting intervenor status to the Salvation Army. The document begins by setting out the history of the organisation; its bulk consists of repeated statements about Salvationists' view of 'the family', interspersed with references to the Army's service role vis a vis 'broken' families. The affidavit does not suggest that 'the family' and marriage are God-ordained; instead, Speck argues that children receive advantages through being raised within "traditional" families.

Indeed, the words "God" or "Jesus" do not appear at all; as an aside, Speck refers once to the Army's goal of "promoting Christian values" (para.7). There is, therefore, no context provided or explanation given for the Army's perspective on familial and sexual issues. Whilst it could be argued that most readers would know the Army was a Christian organisation, a decision was clearly made to find 'secular' substantiation for the Army's religiously-motivated intervention. The affidavit suggests that Salvationist's primary concern is with the welfare of children (paras.12-15). Whilst this is certainly one of their concerns, it is not the principle that motivated

their attack on homosexuality - namely, sin (see Chapter 5).

One of the most revealing passages from the affidavit is the following.

The Salvation Army recognises the inherent difficulties in defining with precision the term "family" in today's society, and in adopting a single or unified vision of the limits of what may constitute a "family". As a result, we do not necessarily disagree with the approach of the Human Rights Tribunal in this case of examining the function of families in today's society rather than focusing entirely on family structure. Nevertheless, we were profoundly distressed to learn that the federal government had neither adduced relevant evidence nor submitted pertinent argument in opposition to the Complainant's "functional" approach (paras.13, 14).

The tone and argument of this passage could not be further from those expressed in an editorial in War Cry, the Army's newspaper, following the tribunal decision. The editorial argued that the adjudicator had "grossly offended most people and ignored the whole of human history" in its "attempt to legislate immorality" (May, 1989). The writer suggested that a "homosexual rights" domino effect would occur - "life as we know it has been changed irrevocably" (War Cry, May, 1989). Far from pleading for "relevant evidence" to be "adduced", the War Cry went on to call for the dismantling of "unregulated bodies" (meaning the federal Human Rights Commission) that were engaged in "undermining the foundations of this society" (May, 1989).

Despite Mossop being about the legal recognition of a gay male couple, and despite the Salvation Army's own views as to the immorality of and danger posed by homosexual practices, Speck's affidavit mentions homosexuality itself only once, on the final page (8). The Army neither explains that homosexuality is contrary to God's plan nor that "the marriage of one man with one woman is a sacred institution ordained by God".¹⁷ Instead, the affidavit simply reiterates the importance of 'the family' for the welfare of children and society as a whole, emphasising the "reproductive function" of traditional families (para.15).

The "reproductive function" is not something explicitly argued within Salvationist politics. It could be assumed that the Army would agree that traditional families serve a 'reproductive function' which, given their understanding, lesbian and gay families do not; however, the Army's positional statements on 'homosexuality' and 'family' do not make this argument.¹⁸ It thus seems probable that its incorporation within William Speck's affidavit was urged by legal counsel, aware that past 'gay rights' cases had centred upon this distinction (see Chapter 2). Similarly, the deployment of the 'child welfare' principle was encouraged by lawyers, confident that such rhetoric would be a language the court would

¹⁷ The Salvation Army Positional Statements, Canada and Bermuda Territory, 1990, p.18.

¹⁸ Ibid., pp.12-13, 18.

understand. When interviewed, the coalition's lawyer quite confidently told me what could, and could not, be communicated to judges (Binnie, interview).

The Affidavit of Constance Gwendolyn Landolt, Vice-President, REAL Women of Canada (in the Federal Court of Appeal)

Gwen Landolt, long-time REAL Women vice-president and herself a lawyer, began her affidavit somewhat defensively. Paragraph two claims the organisation is "inter-denominational", whilst three and four emphatically announce REAL Women's commitment to women's equality. Landolt suggests that the differences between REAL Women and other women's equality groups lies only in the means used for social change.

REAL Women's primary argument is similar to that of the Salvation Army's. The traditional family is the most important social unit, defined through the marriage of a man and a woman. Marriage, RW argues, is a "social" as well as a personal "contract" (para.9). The social contract consists in the couple's reproduction of "successive generations" (para.9). Landolt goes on to suggest that the Attorney-General's office (responsible for appealing against the gay rights judgment) is unable to perform its legal duty due to bias. According to REAL Women, the federal government's favouritism towards

"radical feminist, lesbian and homosexual groups" disqualifies it from properly performing its role to argue on behalf of the traditional family (para.12). Hence, the need for intervenors such as REAL Women.

It could be argued, however, that the affidavit is rather deceptive. Whilst the meaning of "inter-denominational" may be somewhat ambiguous (referring popularly to either a range of Christian denominations or different religious faiths), the word is no doubt intended to suggest that the group has no 'one' religious orientation, or that religion itself is not necessarily the organisation's *raison d'être*. However, whilst there are some Catholic members, there is no indication that Buddhists, Hindus, Jews, Muslims, and so on either belong or are welcome. As I noted in Chapter 5, REAL Women's president quite clearly stated that, whilst the organisation was fundamentally Christian, this was not an element of RW's politics leaders chose to share with the public (Anderson, interview).

It is as well rather dubious for RW to suggest that it "supports policies for women that provide equal opportunity in all areas, including education, employment, and retirement" (para.3). REAL Women adamantly opposes universal child care, equal pay legislation, sex education, human rights provision, and an assortment of other 'equal opportunity' initiatives (see Chapter 5). Whilst they

might argue that the policies they do advocate would 'help' many women, particularly those who solely work in the home, they remain opposed to what are commonly understood as 'equal opportunity policies' for women.

What is both interesting and yet, perhaps, predictable about RW's claims is that the organisation's legal strategy so earnestly attempts to render RW's politics compatible with liberal equality discourse. REAL Women has accepted that, with respect to its public involvement in litigation, the dominant liberal ethos must be adopted. Thus, the REAL Women legal submission, whilst remaining 'true' to the organisation's perspective on 'the family', seeks to conceal both its 'new right' and Christian politics.

Yet, it does not do this completely. The "radical feminist" conspiracy theme makes its appearance in Landolt's discussion of government bias. I would argue that Landolt's views here are an honest, and to some extent accurate, assessment of why the REAL Women coalition has something different to offer the court. She is right that the Department of Justice seems to have put little effort into its case; they called no witnesses at the Tribunal, and their factum makes its arguments in a perfunctory fashion. Whether or not Justice bureaucrats are conspiring with gay rights activists is beside the point; for whatever reason, it remains the case that the government's defense was, arguably, half-hearted and ill-planned.

The Affidavit of James A. Sclater, Assistant to the President for Public Policy and Research, Focus on the Family Association (in the Federal Court of Appeal)

Jim Sclater, (subsequent to this promoted to 'National Director of Public Policy'), combines the 'child welfare' rhetoric of William Speck with the government bias thesis of Gwen Landolt. Sclater first claims that the "primary function" of Focus on the Family is to provide assistance to "families" (para.4). Focus, he states, "believes strongly" that the welfare of children requires "a mother and a father",

...in order that they may attain a strong sense of self, and a healthy ability to relate to others, and in order that they may, in turn, fulfil a normal male or female role...(para.5)

The recognition of "same-sex relationships" as families poses a "serious threat to the structure of society and the health and viability of future generations" (para.6).

Only once does Sclater identify Focus as a "Christian organisation" (para.4). As with the Salvation Army and REAL Women affidavits, Focus on the Family's submission renders almost invisible the conservative Christian theology animating every facet of the organisation's work. Sclater discusses the servicing role Focus plays for "families", but does not note that only Christian families are welcomed. Furthermore, Sclater's affidavit contains no mention of the 'appalling' sexual practices "homosexuals get up to" (Sclater, interview). In contrast to Focus's internal documents, which highlight the 'diseased' and

'predatory' 'homosexual lifestyle' (see Hayton:n.d.), or allege the covert infiltration of the "homosexual agenda" into institutional life (see Chapter 5), Jim Sclater's legal construction of homosexuality is most notable for its lack of definition.

Factum of the Intervenors, The Salvation Army, Focus on the Family Association Canada, REAL Women, The Pentecostal Assemblies of Canada, and the Evangelical Fellowship of Canada (in the Federal Court of Appeal)

The coalition's factum, their joint submission, is perhaps most remarkable for its paucity of argument and contribution to debate. The primary purpose of the factum appears to be to cite and quote from precedent. A variety of previous 'gay rights' cases, all decided negatively, are listed in support of the basic premise that 'family' means a heterosexual marriage (pp.3-5). The public, argues the coalition, has an interest in the preservation and continuing state privileging of the traditional family. This interest is due to the family's role in procreation, and in providing societal stability (para.3).

The document takes issue with the "sociological definition" of family adopted by the tribunal (pp.5-8). Whilst the coalition acknowledges in this document that the popular meaning of 'family' may have changed, it argues that the legal meaning has not. Using a variety of legal

rhetorical techniques, such as the 'slippery slope' analogy, the factum urges the court to adopt the "plain" meaning of the word, which, it suggests, can be discovered by reading dictionaries (para.12). The intervenors further argue that parliament did not intend, when enacting the Canadian Human Rights Act, to protect homosexual relations, and it is not for the court to usurp the role of Parliament (pp.8-9). There is little else to the factum but this.

Has the conservative Christian coalition made a unique contribution towards the judicial appraisal of this case? I would argue that the factum offers no hint of the actual expertise and knowledge the coalition members possess. Legal precedent has replaced God's word as Truth, the dictionary supplanting the authority of the Scriptures. What the coalition had to offer was their Christianity, their world-view as to the imminent and serious threat posed by the conspiracy to further the "homosexual agenda". Instead, the legal process appears to have subverted these beliefs, rendering them invisible. The homosexuals who "eat and rub themselves with faeces", "defecate on their partners", and "drink urine" (Hayton, n.d.) are nowhere to be found. References to the homosexual "sub-culture of prostitution" flourishing in the "inner cities"¹⁹ are notably absent.

¹⁹ 'Laws protecting homosexuals or so-called "sexual orientation" legislation: How it will affect Canadians', Pamphlet, REAL Women of Canada, 1986.

Instead, the factum offers an exercise in legal logic that provides only a faint echo of the coalition's politics. In fact, there is little to distinguish the factum of REAL Women et al. from the factum of the Attorney-General.²⁰ The same arguments are made, the same cases cited. The A.G.'s factum does not, however, discuss the function of family and marriage in society, nor does it offer as much in the way of legal rhetoric (for example, the government does not make a 'slippery slope' argument). In these respects, the intervenors have presented additional legal knowledge, and, perhaps, Landolt's and Sclater's argument, with respect to a lack of governmental commitment to defending 'the family', justified.

Nevertheless, a review of the coalition's legal submissions in Mossop shows the extent to which the right-wing, evangelical Christian politics of these organisations has been muted. This phenomenon can be evaluated in different ways. On the one hand, it could be argued that the NCR's agenda has been marginalised (or co-opted), its leaders' evangelism usurped by its lawyers' legalism. On the other hand, I could suggest my own version of a 'conspiracy thesis', arguing that the NCR has deliberately chosen to hide its politics beneath a cloak of respectability. In this way, judges and others are potentially deceived, remaining unaware of the real 'New

²⁰ See Factum of the Attorney-General of Canada, Federal Court of Appeal, Mossop v A.G.

Christian Right Agenda'. Or, is a more accurate view somewhere in between - a mixture of legal colonisation and pragmatic politics?

Feminist legal submissions do not necessarily reveal the radical politics of, for example, the many lesbian feminists who work for feminist legal action groups and participate in the drafting of documents. Is this a deliberate strategy of deception or an example of pragmatic political struggle (or both)? What is interesting about this process, are the specific ways in which legal discourse compels the adoption of a particular pragmatic politics (liberal legalism) and that it appears to affect social movements on either side of the political spectrum. Further, as I discuss in Chapter 7, even when alternative perspectives are submitted to courts, they tend then to be simply ignored.

It is worth considering NCR leaders' own explanations for the process of legalisation that occurred for the coalition members in Mossop. According to Judy Anderson, Jim Sclater, and Don Hutchinson, there could never be any question of submitting an overtly Christian document to the courts (interviews). They and their organisations view society as profoundly anti-Christian, and hence their political communication must be informed by other knowledge sources in order to be publicly credible. Judy Anderson, for example, argues that,

Christianity is allowed to be lambasted at every opportunity...things can be said about us you can't even say about gays any more...Christianity is low man on the totem pole, anybody can give a kick and get away with it. We're at the back of the bus now...everywhere Christianity is derided and treated with disrespect (interview).

As I left her house following this interview, Anderson pointed to a Christian prayer she had hanging in her front hallway. She told me that every time someone came to interview her she considered whether or not to take this prayer down and hide it, knowing that this symbol of religion could lead journalists and researchers to "totally dismiss" her. She likened her feelings to those of closeted lesbians and gay men, who "were" (in her view) once reduced to similar 'sterilisation procedures' (my interpretation) in their homes. Now, she feels the tables have turned. According to Anderson, neither group should be in such a position (interview) (although she was perhaps unable to understand how REAL Women's potential success could substantially reduce the possibility of lesbians and gay men being out).

Don Hutchinson, the Salvation Army's legal advisor, has a similar, although somewhat more complex analysis.

...in today's society there's a sense that Christianity was or is the faith of the majority, that the majority has imposed its will on others, and that we are in an era where minority rights should be recognised as much as possible...there's a perception that Christianity is responsible for the abuse of rights, rather than any kind of recognition that the Christian faith works hand in hand with societal development.

There's a societal backlash if you stand up and say I'm speaking from a Christian perspective...there's a tendency in the church to be fearful...or to wisely temper their Christian perspective with the appropriate supporting documentation from other sources (interview).

Hutchinson's last comment captures what conservative Christians feel to be the pragmatic reality they face when attempting to communicate publicly, whether within law or any other discursive field. For Focus on the Family, a key activity is gathering together certain 'scientific truths' and disputing others (see Hayton, n.d.). Unlike fundamentalists, these Christians do not hesitate to engage the secular world on its own terms.

Jim Sclater, National Policy Director for Focus on the Family, asks,

Why waste our words? The truth is that we are not in a Christian society and we don't believe that it is even necessarily appropriate to appeal to our Christian theology. Our only argument that has validity in our society is whether it benefits our society and the individuals in it. We argue on the facts, we argue out of our conviction, we're there because we believe that the Christian scripture gives us an agenda and because that's who we are. But we'll argue the facts, as we think they're relevant in law.

We also believe that all truth is God's Truth. The truth about my body as a sexual being is truth. Christians shouldn't view the body or the mind as separate from what we can find out about it through other means. When we talk about the family, we understand it psychologically as well as theologically. We know, from the history of psychology and human history that males that aren't raised by a mom and dad don't always turn out the same way as those who are. Modelling happens. Maleness is picked up. Of course the men's movement right now in North America and around the world is based on the idea that men need a father, and if they don't have one they need a surrogate father. If they don't have a

surrogate father at least they need male bonding, because men are finding out that the nature of their manhood is that it needs affirmation from other males, particularly from preceding generations.

Those are 'facts' that can be discovered by studying the social sciences, we don't need to bring our theology into court to prove that. If we did, most people would turn off immediately anyway (interview).

In this way, the discourses of psychology, sociology, and the modern 'men's movement' can be woven together to form a coherent, non-religious public statement. Internally, the effort can even be justified theologically - "all truth is god's truth" - meaning, presumably, that god creates all legitimate forms of knowledge, not just those contained in the bibles. Knowledge perceived to conflict with biblical pronouncements however, such as 'evidence' that children are not harmed by being raised in father-less homes, would presumably be viewed as false knowledge, rather than god's truth.

The ways in which conservative Christians tailor argument to audience is reiterated by Judy Anderson.

I can write from a religious point of view, my own faith, or I can take the same thing and say it not using the code words for religion...if I'm going to talk to the Catholic Women's League, sure, I'll talk about faith there because we all understand it, but if I'm talking to the Royal Canadian Yacht Club, I can say the same thing, but without using my own particular faith language (interview).

There is nothing particularly startling or unusual about this. Academics and activists alike, feminists, lesbians, socialists, we all give different speeches to different

audiences. What is interesting about Judy Anderson and REAL Women is the extent to which their conservative, evangelical Christianity has deliberately been so completely submerged and unspoken when it is their 'faith' which clearly underlies much of their political agenda. Even the Salvation Army, an organisation very publicly identified as Christian (although perhaps, mistakenly, no longer as evangelical), feels unable to present its biblical position to the court (Hutchinson, interview).

Thus far, I hope to have shown how the sexual politics of the New Christian Right, as evidenced within the movement texts of three organisations active in Canada today, was considerably altered, and indeed cut out of the legal submissions in one particular intervention. I have suggested a partial reason for this - namely, the views of leaders as to what can be publicly communicated. Quite clearly, an initial period of self-censorship took place, as it does for many movements on the left (see Chapters 3 and 4).

It would be misleading to suggest that something called 'Law' was necessarily responsible for this. Social movement actors are no doubt aware of the conventions, practices, and rhetoric of legal discourse; as a result, many may feel that litigation is a particularly fraught exercise. At the same time, however, those who believe themselves to hold marginalised perspectives on social life

often feel that any engagement in 'the public realm' necessitates the translation of their radical politics into a more acceptable (liberal) form. What is interesting about the case of the New Christian Right is that, in engaging with law, they have lost nearly all the key elements in their sexual politics. Right-wing activists have had to concede that the ideology of 'formal equality between the sexes' dominates and that support for gay rights is a relatively wide-spread phenomenon. Despite their 'real' belief that homosexuality is dangerous precisely because it is 'sick', 'sinful', and 'seductive', coalition members have chosen not to present such a perspective. And, except for brief references to 'modelling', NCR analyses of the relation between gender and sexuality also remained unspoken.

How seriously should we take the New Christian Right in Canada? This is the question which I move on to now. For those who refuse to accept the authority of Scripture and the Second Coming of Jesus, New Christian Right politics is a politics of hate, death, imperialism, and destruction. The theology motivating the NCR and its 'army of saints' is frightening (even more so if you are one of those condemned to the hell-fires of Armageddon); the relatively measured tones of the individuals I interviewed should not obscure this 'reality'.

C. Analysing NCR 'Effectivity'

Academics are divided over whether the NCR can be said to be a vibrant or a dying force in North American political struggle. In Canada, for example, some feminist writers have attributed a great deal of success to REAL Women. Dubinsky (1985) cautions that the Canadian new right has "not yet reached its zenith", and there is a need to pay REAL Women "close attention". Erwin (1988a, 1988b) alerts us to their increasing influence, Gill (1989) argues they have achieved a re-orientation of media discourse on feminism, and Ross (1988) credits RW with forcing the defunding and increased policing of lesbian projects by the Secretary of State Women's Programme. Others, however, such as Razack (1991), find REAL Women barely worth mentioning.

In the United States, various studies undertaken in the 1980s show that NCR practical successes were limited, consisting of electoral victories that were few and often momentary, and a legislative agenda that made little progress (Lipset and Raab, 1981; Johnson and Tamney, 1982; Zweir, 1984). Steve Bruce (1990:175) goes so far as to suggest that the NCR, far from being a 'disciplined, charging army', is, rather, a "motley crew" (1990:175).²¹ This view, however, is not shared by Sara Diamond (1989), who sees in the NCR's world-wide network a formidable enemy

²¹ See also Hadden (1983); and, re: abortion, Petchesky (1984:259-61).

to progressive social change. Others suggest the American NCR is re-grouping, re-directing its energies locally, and most certainly not "withering away" (Helvacioğlu, 1991). Further, the NCR was initially mobilised by economic new rightists, and has continued to play an important role in facilitating new right politics generally. So long as there is a 'right', there will likely be its Christian component.

In suggesting that the NCR remains an important social actor, one could also argue that the activities of an organisation like Focus on the Family imply, perhaps, a growing, imperialistic, American 'mission' in Canada. NCR foreign intervention and agitation, so thoroughly researched by Sara Diamond (1989), is unfortunately ignored by many writers. American Christian corporations are active all over the world²², often engaged in propping up brutal dictatorships. Whilst these activities are more common to American-based organisations, it is imperative for Canadians as well to view the NCR's agenda in its entirety. Lesbians and gay men are not the only targets; attempts to combat NCR influence in the realm of sexuality must take account of the connections between domestic and foreign activities.

²² Most recently, in the former communist countries. See re Albania, for example, E. MacDonald, 'US Baptists Corner a Muslim Market' (18 October 1992) Independent on Sunday.

Thus the NCR's agenda needs to be examined in its entirety -their views in one area are often linked to their views in others. For example, as I briefly discussed in the previous chapter, the representation of the 'inner city' as a den of homosexual iniquity is intimately connected to the construction of it as a centre of non-white (predominantly Black) criminal (including illicit sexual) activity. Furthermore, the opposition of NCR constituencies to 'gay rights' is rooted not only in their Christian beliefs, but also in the white backlash to perceived anti-racist initiatives. This is consequential because it can help explain the appeal of the NCR agenda to people who may not completely share all the tenets of conservative Christianity.

It is also important to note that most social movements are active on several fronts at once. It does not follow from the NCR being weak in one, for example 'winning' legal cases, that it is therefore weak in all. In the United States, the NCR and its legislative representatives (eg: Jessie Helms) have recorded a number of successes in the field of arts censorship, achieving the public de-funding of individual artists and progressive arts organisations. Many American feminist, lesbian, and gay artists would find Bruce's (1990) analysis, that the NCR is 'dead', inaccurate and offensive (as would pro-choice activists).

With respect to law, the arguments made in this chapter suggest that the legal process, be it legislative or judicial, is a key site of social movement struggle. Whilst individual battles can be seen to be 'won' or 'lost' (such as Bill 7, or the Mossop case itself), the relation between legal discourse and social movement politics is something more complex than a simple 'results tally' would indicate. For example, the REAL Women coalition may well 'lose' the Mossop case at the Supreme Court of Canada; however, it would be misleading to view such an outcome as an indication of NCR 'powerlessness'.²³ It was just such a hostile climate that fuelled the American NCR eruption in the 1970s. The Roe v Wade abortion decision was instrumental in fostering NCR mobilisation in that country; the more recent judicial erosion of the Roe privacy principle has, paradoxically, put anti-abortion forces on the defensive and facilitated pro-choice mobilisation.

The effects of Mossop's eventual outcome at the Supreme Court of Canada can be suggested, but in no way predicted. Will a 'pro' gay rights decision by Canada's highest court mean substantive changes in the lives of lesbians and gay men? Will the fury of the New Christian Right be even more unleashed? Will lesbian and gay communities lose political momentum and rest easy in our official status as a 'minority' deserving of public

²³ This is David Rayside's (1988) conclusion vis a vis the right following their 'loss' of Bill 7, see Chapter 3, and 4.

protections? Will the knowledge and skills gained by NCR organisations and leaders as a result of unsuccessful legal struggle be significant, perhaps providing that movement with a better base from which to launch the next battle?²⁴

Whatever the result of Mossop, the success of NCR organisations in achieving legal intervenor status should not be underestimated. Whether they win or lose, these organisations have been granted an official, public platform from which to preach. Whilst their legal submissions may be innocuous and uninteresting, and only a handful of people will ever read them, the organisations' official legal status confirms the NCR as a legitimate party in more popular debates around sexuality and family. In the pages of the mainstream media, there may be other considerations related to effective communication, but NCR activists will not be so constrained by the imperatives of legal discourse.

Despite their dissatisfaction with the courts and the Charter, many NCR organisations are turning more and more to these forums as ways of communicating their beliefs (Hutchinson, interview). The culture of Charter-litigation has played an important role in mobilising not only progressive forces but, as Fudge (1989) has suggested, the right (at least in terms of formal organisations and

²⁴ Note that I have discussed some mobilisation issues in Chapter 4.

leaderships) as well. Indeed, the inauguration of Jim Sclater's Legal Defense Fund, with its stated goal of attracting money from groups that might not approve of the entirety of Focus's or REAL Women's agenda (I believe the main groups in mind here are the anti-abortion lobbies) could be a rather significant event. The intention is for the Fund to facilitate broad-based NCR legal initiatives (Sclater, interview).

The Canadian New Christian Right is, in a sense, a novice at legal struggle. It is only beginning to flex its muscles, to extend its reach into this arena. The experience of organisations such as Focus on the Family, REAL Women, and the Salvation Army in a case like Mossop is a learning one for them. Win or lose in the short-term, they have gained valuable contacts, achieved a degree of mainstream respectability, and, perhaps most significantly, further supplemented their own 'Truths' as well as arming themselves with legal knowledge, strategies, and argumentation. In addition, they have succeeded in making the Mossop case a three-way site of struggle between the lesbian and gay rights movement, the government, and the New Christian Right. This last point means that both the lesbian and gay movement, and various state actors, must respond in some way to them. An evaluation of NCR effectivity must, therefore, also consider the ways in which that movement affects the discourse and strategies of others. For example, the NCR's relentless attack upon the

Charter may mean that left-wingers, who might otherwise be similarly critical of Charter-culture, instead defend its limited achievements. This phenomenon, whereby progressive academics and activists feel compelled to defend minimal policies and programs, rather than seek substantive changes to them, is one of the most significant ways in which the right shifts the battleground.

Having said this much however, it is important not to over-emphasise the NCR threat. Social movement 'effectivity' is an elusive concept. For example, some writers suggest that the American NCR managed to infiltrate the Republican Party. Whilst their candidates were somewhat unsuccessful in securing Republican nominations, the Party was forced to respond to the NCR agenda, taking on board a number of evangelical Christian positions (Diamond, 1989). Others, however, suggest that Republican support for the NCR agenda was largely rhetorical and, further, that the very process of 'infiltration' was a co-opting one, altering the NCR agenda as much as the Republican Party's (Bruce, 1990:149-54).²⁵

²⁵ Furthermore, this process should not be analysed solely as 'history'; the early 1992 battles for the Republican nomination between Bush, Buchanan, and Duke reminded us both that the right is divided, and that conservative Christianity remains a potent political force. At the same time, the latter stages of the 1992 presidential campaign suggested that the Republicans courting of the Christian right had backfired. Re Canada, see M. Cernetig, 'Preston Manning and his faith', (2 December 1991) Globe and Mail.

Neither can the NCR be said to be an instrument of corporate America. Much is sometimes made of the funds corporations contribute to the American NCR (eg: Diamond, 1989). However, other research shows that the major American corporations have rarely contributed to NCR coffers, preferring instead the old-fashioned Republican Party, often against NCR factions (Bruce, 1990b:54-5)). Furthermore, I would suggest that, these days, for every corporation giving funds to right-wing organisations one might find another adopting a 'sexual orientation' human rights policy or selling its products at Lesbian and Gay Pride festivals.²⁶

Furthermore, the conservative Christian movement is itself disparate and divided. Those active in NCR politics agree to put aside theological differences in order to unite around 'shared values' (Wuthnow, 1983). However, in the process, those shared values are compromised, organisations become unwieldy, and leaders increasingly removed from the concerns of grassroots constituents (Lienesch, 1982; Wilentz, 1990).²⁷ In the United States, several studies indicate that those who share a number of 'pro-family' values often neither support NCR organisations

²⁶ See, for example: 'Advertisers, Gays March With Pride' (24 June 1991) 96 Marketing 8; T.A. Stewart, 'Gay in Corporate America' (16 December 1991) Fortune 42.

²⁷ Chandler (1984) discusses how the NCR's attempts to ally with earlier-reviled Catholics and Mormons caused problems for the movement; see also Wilcox and Gomez (1989-90) re alliances with Catholics.

nor endorse the NCR agenda (Simpson, 1983, 1984; Shupe and Stacey, 1984). I have previously shown how Bibby's (1987) Canadian data indicates a discrepancy between NCR organisations and the belief-systems of those they claim to represent (see Chapter 5).

In this way, the setting up of structures such as the Legal Defense Fund may have effects contrary to those intended. For example, the increasing desire of the Canadian NCR to 'work together', and develop political coalitions, may succeed in achieving a similar atmosphere of conflict, and consensus break-down as has been experienced in the United States. Indeed, Don Hutchinson, the Salvation Army's legal advisor, expressed the view that an evangelical Christian movement could never really succeed in Canada, given the extent of internal division (interview; see also Cuneo, 1989).

It is important, however, to problematise our notion of 'success'. Fields (1991) has argued that right-wing movements do not need to mobilise large constituencies or gain 'control of the state' in order to achieve a significant impact upon public debate. Her analysis, drawing from Habermas (1987b), suggests that the 'power' of the New Christian Right lies in its ability to explain the social world, to confidently identify problems and solutions, and to communicate these ideas as an alternative vision (see also Heinz, 1983). Fields (1991) argues that

the NCR is one oppositional social movement amongst many, but one with significant powers of social interpretation (see also Susan Harding, 1991).

Although Fields does not discuss law specifically, I would suggest that legal cases can provide the right, as well as the left, with opportunities to contest dominant frameworks of meaning. However, the 'success' of this struggle may be related to how well the case affords access points into other fields (such as media or politics) rather than what is written down for judges in legal submissions. With respect to Mossop, it would seem that with regard to these considerations the case has been far more successful for the gay litigant than the NCR organisations. For example, Brian Mossop argues that his litigation achieved his prime objective - getting on the radio to talk about sexuality (interview), whilst Judy Anderson maintains that the "radical feminist" media has conspired to deny her an opportunity to speak on the matter at all (interview).

In analysing the 'success' of the three organisations studied here, there is little indication that REAL Women, for example, is gaining political ground. Whilst the organisation has made friends in the Conservative Party, activists' language has, at times, been 'too extreme', too hateful, for the organisation to make much impact upon the 'liberal centre' (see also Chapter 4). Judy Anderson quite

rightly noted that RW spokeswomen often sound foolish and 'hysterical' when quoted in the media (interview).²⁸

The election of Anderson to the presidency signalled, perhaps, an attempt by REAL Women to soften its tone, and change its image. Anderson is a full-time teacher, married to a divorced man, primary income provider for her family, with children in day care (interview). Whilst she firmly believes in the "radical feminist" conspiracy, she is somewhat sensitive to the position of lesbians and gay men, 'has gay friends', believes gay teachers should have job protection, and expresses no wish to "gay bash" (interview). Thus, as I argued in Chapter 4, were REAL Women to substitute its language of homosexual disease and depravity for the more muted and popular tones of, for example, rights rhetoric, they may have more communicative success.

Focus on the Family Association is an organisation likely to play an important, but behind the scenes, role in NCR Canadian activity. Focus is, perhaps, too American, and, again, too 'over the top', for it to be a public NCR leader in its own right. On the other hand, during recent battles over telecommunications licensing and the portrayal of lesbians and gay men in public broadcasting, Focus did

²⁸ As I discussed in Chapter 4, the mere fact of entry into media texts says little about how activists' views will be represented.

play an important role.²⁹ The success of Focus on the Family may partially depend on its ability to appear 'pro-family', whilst disguising its fundamental religious theology. The creation of the Legal Defense Fund will assist in this.

And, what of the Salvation Army? I have previously suggested that the Army finds itself in a paradoxical position vis a vis the Mossop case. On the one hand, whilst they oppose homosexuality on biblical grounds and believe in the ultimate necessity of saving souls for Jesus, Salvationists, to a large extent, do not support the NCR agenda of organisations like Focus and REAL Women. Yet, they appear in this intervention as primary funders and legal directors. Don Hutchinson was clearly uncomfortable with this role; he insisted that the coalition did not signal the Army's intention to join forces with Focus and REAL Women in the long term (interview).

One of the things we have made quite clear is that this association or coalition is strictly for the purposes of intervention in this case, it is not a long-term arrangement...The Salvation Army assesses its involvement with these matters on a case by case basis. We do not tend to throw our hat into the ring with coalitions that operate on a long-term basis. Principally because it's very important to us that we have some degree of control over what words are put into our mouth, and prefer to speak for ourselves...(Hutchinson, interview)

²⁹ See also, D. Todd, 'Evangelical Christians argue gay bashing a God-given right' (30 November 1991) Vancouver Sun. The title of this article would seem to confirm NCR constructions of media bias.

The Salvation Army would appear to be a weak link in this particular NCR chain. The leadership is clearly uncomfortable both with their own involvement with some of the other organisations, and with how this will be publicly perceived by those who support and appreciate the Army's work in other areas. Again, their continued role in similar struggles may depend on the extent to which their participation is invisible - a 'solution' that would seem to render the participation itself questionable.

In Canada, for the moment, it would seem worthwhile to consider NCR politics, neither awarding it more attention than it deserves, nor dismissing it as the absurd ravings of 'religious fanatics'. Rather, opposing activists should perhaps be informed about this movement, its history and practices, examining the, perhaps unnecessary, 'self-policing' responses they make to it. It might also be useful to consider adopting a strategy of the U.S. anti-NCR organisation, People For The American Way (PAW).³⁰ That group has waged several successful campaigns exploiting the 'liberal consensus' in the United States. PAW has actively sought to publicise the internal documents, speeches, and so on of NCR organisations and leaders, thereby revealing the underlying 'politics of armageddon' behind NCR public expressions.

³⁰ Discussed, for example, in Bruce (1990:178-9) and many other NCR analyses.

A strategy such as this (partly used, for example, by the Coalition For Gay Rights in Ontario during Bill 7), is only appropriate for certain political climates; the presence of a 'liberal consensus' which would find NCR religion extreme, dangerous, and alienating must be apparent. However, in North America, we do seem to live in such a climate today; indeed, this is recognised by the NCR itself, and PAW's campaigns have tended to be well-received. Thus, progressive movements might consider such an approach, particularly in a case such as Mossop, where the content of NCR legal submissions in lesbian/gay equality cases is as far removed from NCR sexual politics as NCR sexual politics is from the sexual politics of the 'general population'.

We must also remember, however, that 'the general consensus' can always change. There are enough historical examples of societies that quickly dispensed with concepts of equality and justice to prescribe and enforce hierarchies of race, religion, and so on. Knowing the beliefs and goals of conservative Christians may make some of us more appreciative of liberalism - this is not an unimportant point. At the same time, one ought not to lose sight of the ways in which the 'liberal centre' is susceptible to pressure from the right, and from the left.

D. Concluding remarks

It is, perhaps, worth stating what has so far been implicit: both the NCR, and its opponents (feminists, lesbians, gay men, socialists, etc.) share similar yet irreconcilable views of their social worlds. Both believe the other (or some 'other') controls society's major institutions. Both share a fear and distrust of the other, each vilifies the other in internal communication. We each perceive our adversaries as constituting a networked, formidable obstacle to social transformation. To varying degrees, we have also linked 'the state' to our opponents' agenda. For example, left-wing academics have long suggested that judges have a conservative agenda, and decide cases based on the values and politics of the privileged classes from which they are drawn. Interestingly, this is a view echoed by REAL Women. They argue that,

The ultimate decision of the courts has a great deal to do with the judge's own personal perspective of life and society...the Supreme Court of Canada...is in fact imposing a liberal interpretation of the Charter on our country....³¹

Thus, only the 'liberal centre' insists on maintaining notions about law's neutrality, or judicial impartiality.

How can these two very different 'right' and 'left' interpretations be reconciled? There seems little doubt that Judy Anderson, Don Hutchinson, and Jim Sclater express

³¹ 'Charter of Rights - Effects on Women and the Family', Pamphlet, REAL Women of Canada, n.d.

a 'reality' in saying that conservative Christian theology is presently not given mainstream social credibility as a source of knowledge and action. Similarly, feminist perspectives which challenge notions of gender and seek to question compulsory heterosexuality are also marginalised. REAL Women's "radical feminist" is 'really', someone like myself might argue, a 'liberal feminist', and, perhaps, part of a 'liberal feminist conspiracy'. Nevertheless, feminist groups probably do receive more public funding than conservative Christianity; Brian Mossop does perceive himself to have had access to and success with the media, and Judy Anderson claims neither (interviews); the movement for lesbian and gay legal equality has made enormous strides within the last ten years. And, yet, as I have already indicated, the NCR has had its impact, although, perhaps, in Canada, not as great - yet.

The arguments I have put forward also suggest a complex and contradictory understanding of the role of 'the state', and the concept of 'power'. For example, Brian Mossop, employed by the federal Treasury Department, could, in one sense, be seen to be making a claim against and a demand from 'the state'. Yet, the situation is somewhat more complicated than this. The Mossop case has seen one statutorily-created, government appointed body (the human rights tribunal) order a government ministry (Mossop's employer) to officially recognise a gay male couple as "family"; another government-appointed agency (the Federal

Court of Appeal) overturned this decision; yet another (the Supreme Court) may well chose to uphold the tribunal's original judgment. And, upon this terrain, opposing social movements struggle for interpretive authority.

Within contemporary struggles around sexuality, the lesbian and gay movements, and the New Christian Right, each perceive 'the other' to 'have power'. Yet, the Mossop case, and I include the litigation's effects well beyond the confines of strict 'legal processes', reveals the ways in which power has shifted between liberal professionals (the tribunal adjudicator; the Court Challenges administrators), conservative judges (at the Federal Court), Conservative politicians, and the irreconcilable movements of diverse social actors.³²

I am not here subscribing to liberal pluralist theory; nevertheless, the relation between social movements, legal processes, and 'state' agents is a complicated one. For example, I have suggested that the dominance of liberal equality discourse in Canada, and the gradual 'success' of lesbian and gay movements for inclusion within its terms, has made it correspondingly difficult for right-wing movements to publicly express virulent homophobia. Rather than vilifying 'homosexuals', New Christian Right activists have focused their public rhetoric around child welfare and

³² See also Beckford's (1990) understanding of the different forms of power potentially wielded by NCR movements.

general 'family' principles. Interestingly, this has led to a 'new' social phenomenon - the need to defend and justify heterosexual marriage - a task inconceivable in an earlier period of homosexual pathologisation. It is thus arguable that cases such as Mossop, regardless of outcome or possible negative effects, may succeed in putting heterosexuality on the defensive, or, at least, into question, and that liberal equality's seeming ability to accommodate 'lesbian and gay' subjects has facilitated this process.

Finally, whilst the New Christian Right may not be able to mobilise a massive constituency, or play a crucial role in the 'making' of political power, it is nevertheless important to avoid underemphasising the power Christian religion continues to exercise within the lives of many people. In the fight for lesbian and gay liberation particularly, the conservative Christian tradition poses a formidable obstacle.

CHAPTER 7

JUDGES AND EXPERTS

In previous chapters, I have addressed several issues to do with the relationship between social movements and law reform. I have deliberately avoided prioritising what goes on 'in court' and, instead, have explored how diverse texts, actors, strategies, and politics affect this engagement. Indeed, I have suggested that the outcome of particular cases, and the content of judicial utterances, are often not the most important elements in law reform struggles. However, I now wish to consider the role and politics of judges and experts within litigation - a site where many legal analyses often begin (and end).

In this chapter, I am concerned with pursuing two related questions. What is the role of 'experts' within litigation? And, why do judges reach the decisions they do? I begin by considering the 'politics of expert witnessing', from the witnesses' perspective. I then focus upon several Canadian lesbian and gay rights cases and also refer to other decisions, including an American case involving a claim of 'sex' discrimination. I provide a detailed analysis of the two judgements in Mossop to give a fuller picture.

A. The Role of 'Experts'

Those seeking both to advance and thwart social change through law reform have historically made use of 'expert' knowledges (Kargon, 1986). Often, as I have noted in previous chapters, this has involved the appropriation of professional discourses by social movements seeking to convince and persuade others. Within litigation, however, the 'expert witness', a person who is deemed sufficiently knowledgeable by the court to give 'opinions' (and not simply recount 'what they saw'), is the only authority permitted to expound on professional matters.

Many writers have analysed the difficulties encountered by professional 'experts', most focusing upon the tensions to do with 'role negotiation' (scholar vs advocate).¹ For feminists and others, a more important concern has been the ability to communicate effectively the complexity of their politics within legal forums. For example, Alice Kessler-Harris (1987), a feminist historian, has written of her experience as an 'expert witness' in the Sears case,² compelled, given the adversarial proceeding,

¹ See, for example, Gothard (1986); Levine (1983); M. Rose (1986); Rosen (1977).

² The details of this American case are not important for my purposes. Briefly, the claim against the company was initiated by the human rights regulatory body on behalf of the class 'women'. The claim alleged that Sears had engaged in hiring and other practices which effectively prohibited women from taking up more lucrative sales positions. One legal issue revolved around whether women 'chose' not to take up such positions (eg: they preferred to work part-time, did not feel comfortable in high-powered sales jobs, etc.), or were structurally prevented from

into adopting a rigid analysis to which she did not fully subscribe.

One intuits the difference between working in a library and participating in a courtroom drama, but until one has experienced it, the disjunction between the two remains abstract. Accustomed to developing the subtle distinctions of an argument, to negotiating about fine points of interpretation, the historian quickly discovers that thesis skills must be abandoned in testifying. Maintaining a position is as important as the position taken. Consistency is not merely a virtue but evidence of one's expertise...I got my first taste of the clear distinction made by the legal profession between learning the truth and constructing a case; between understanding and persuading. And there, I also learned for the first time, that precisely what I as a historian cared most about would surely destroy my testimony if I pursued it. My job, I was told, was to answer all questions, but to provide no more information than was demanded...Any attempt I made to introduce controversy, disagreement and analysis merely revealed that history was an uncertain tool and invalidated both its findings and my conclusions...I found myself constructing a rebuttal in which subtlety and nuance were omitted, and in which evidence was marshalled to make a point while complexities and exceptions vanished from sight (Kessler-Harris, 1987:61-2).

Kessler Harris (1987:64) expressed "surprise" at how the lawyer for Sears often did not challenge the substance of her testimony but, rather, the language in which it was phrased - a tactic that often resulted in her comments being presented as absurd or extreme. The structure of 'yes' or 'no' answers also complicated her ability to respond.

I was nevertheless astonished at how easy it was, within the yes or no format demanded by the

doing so as a result of Sears' discriminatory practices. The company won the case. For comment, see Kessler-Harris (1987); Scott (1988a; 1988b); Milkman (1986). Several court documents are reproduced in Hall (1986).

court, to agree with statements simply because I could not deny them, not because they represented my understanding of the issues involved (Kessler-Harris, 1987:64).

Margrit Eichler also confesses to having rather ambivalent feelings about her part in Canadian lesbian and gay rights cases (interview).

...[it is] very difficult for someone who defines herself as a scholar, in the sense of being involved in trying to generate knowledge, not just taking what's there and teaching it, to be put into a situation where you're under oath and where the attempt is to make scholarly research serve a purpose for which it was not created...that's the basic problem (Eichler, interview).

Eichler's evaluation of the different cases in which she's been involved is mixed. The Andrews case³, for example, was not a "pleasant" experience for her; she recalls that Andrews' lawyers insisted upon maintaining complete control over questioning and legal strategy. Eichler felt like "a slot machine, different buttons are being pushed, if someone pushes the wrong button there's very little you can do about it" (interview). As I have discussed elsewhere (Herman, 1991),⁴ Eichler was "pushed" into making several statements that did not reflect the complexities of her analytical approach to 'family'.

³ See Chapter 2 and later in this Chapter.

⁴ In this article, I was not particularly sympathetic to Eichler's intervention, and tended to underestimate the limitations within which her testimony was given.

On the other hand, Brian Mossop's counsel (lawyers with the Canadian Human Rights Commission) "took the time" to listen, and responded positively to Eichler's suggestions for re-orienting their legal argument (Eichler, interview). Eichler believes her contribution is far more valuable if she is allowed to formulate the questions lawyers will ask her in direct examination (interview). The assumptions underlying courtroom questions, and legal actors' unwillingness to admit them, are, for Eichler, the key obstacle to a 'successful' 'expert' intervention (interview). In her view, the ideal 'expert' contribution is, perhaps, a written paper or report, rather than oral testimony made to appear absurd or ridiculous during questioning from lawyers on both sides (interview).⁵

In many cases, then, the 'expert' witness is thus prevented from displaying the full breadth of knowledge they possess. Certain perspectives are excluded (by lawyers, legal conventions, and so on) from the legal process, often prior to judges even hearing the case. What, however, happens to the 'expert' evidence that is presented to the court?

⁵ In Knodel, the psychiatric report was given in such a manner (see Chapter 2 and below).

B. Judges and Experts

Lawyers present 'expert' evidence to judicial forums for several reasons. In part, the production of an 'expert witness' has become a historical convention, each side must have at least one or risk being considered incompetent. Indeed, the federal government's failure to present an 'expert' in Mossop was partially responsible for the NCR deciding that the Attorney-General's office lacked the necessary commitment to defend the case. Primarily, however, 'expert' evidence is offered to convince, persuade, and educate decision-makers (see Chesler et al., 1988). In this way, legal forums often become complex battlegrounds between opposing experts and their respective 'knowledges'. Judges respond to these interventions in different ways.

[1] Knodel (1991)

Timothy Knodel sought to have his health benefits extended to his partner. The legal battle was over whether the 'opposite sex' definition of 'spouse' in the governing legislation infringed s.15 of the Charter. The judge concluded that it did, and ordered that same-sex couples be included within the legislation's definition of 'spouse' (Knodel, 1991).

During the hearing of the case, Knodel's lawyer presented to the court the report of an 'expert'

psychiatrist. Michael Myers, "clinical professor of psychiatry at the University of British Columbia", concluded that homosexuality was innate and due to an "abnormality in brain differentiation of the developing fetus" (Knodel, 1991). "Homosexuals", Myers argued, had "no control" over their sexual proclivities (Knodel, 1991). The psychiatrist also defined homosexuality for the court and stated its statistical incidence in "western culture" (Knodel, 1991). He further presented a 'psychological portrait' of the homosexual (not dissimilar to the one painted of 'Black children' in the Brown civil rights litigation nearly 40 years before, see Chapter 2), based on the concept of 'stigma'.

By the time of puberty, most of these individuals, who have felt 'different' as children, begin to experience strong feelings of attraction to members of their own sex. They have no control over these feelings - they are not a deliberate choice. For most of them, this is very frightening and lonely, because they have come to believe that what they are experiencing is not considered normal by most of society. This then leads to isolation, unhappiness, self-loathing, and a sense of inferiority. I have listened to the life stories of hundreds of homosexual men and women and I can attest to the pervasive influence of discriminatory ideas, beliefs, and laws on the sense of these individuals. This indifferent or hostile climate not only damages one's worthiness but causes many people to lead double or fragmented lives. They dare not be open for fear of further ridicule and rejection. Many attempt to pass as heterosexual people and do their best to conform. When they meet someone else, fall in love, and become a couple, they are usually much happier and find it easier to cope with life. (Knodel, 1991)

Myers also testified, based on a personal interview with the claimants, that Knodel and his partner were just this type of happy couple. Adopting the analysis of Margrit

Eichler (the sociologist figuring prominently in the Mossop litigation), the psychiatrist listed several factors 'proving' that the two men were a couple 'no different from' heterosexual ones, and that together they constituted a 'family' (Knodel, 1991).

In setting out the evidence, Rowles, the British Columbia Supreme Court judge hearing the case, reproduced several passages from Myers' report at length. Her decision, however, is not based at all on the psychiatrist's definition of homosexuality, or even his evidence of the harm caused by "stigma". Instead, in her resolution of the dispute Rowles refers only to Myers' analysis of the two men as a "family", an understanding he acknowledged was borrowed from sociology.⁶ Clearly, the psychiatric evidence played some role within Rowles' text, if only as a sign of her sympathy with 'poor unfortunates'. There is, however, little indication that Rowles was persuaded, educated, or informed by the 'expert' intervention.

[2] Andrews (1988)

Despite having a rather conservative litigation strategy,⁷ the lawyers acting on behalf of Karen Andrews'

⁶ As is, I believe, the concept of stigma.

⁷ Karen Andrews, Address (Osgoode Hall Law School, York University, 22 February 1989).

claim for 'family' health benefits presented several 'alternative' knowledge sources to the court. No psychiatric evidence was offered; instead, 'expert' contributions were solicited from three sociologists, two of whom had written extensively on lesbian and gay issues.

These latter two, Barry Adam and Mariana Valverde, discussed in their affidavits historical persecution and the formation of sexual identities respectively.⁸ Each scholar attempted, within the limits set by Andrews' attorneys, to offer the court elements of a 'social constructionist' approach to sexuality; however, the primary paradigm they each employed was the 'minority' one (see Chapter 3). Valverde's affidavit noted arguments for the immutability of homosexuality; however, she neither endorsed nor rejected such perspectives (nor did she offer a 'choice' analysis). Whilst both these 'expert' interventions sought to inject some alternative perspectives from feminist and lesbian and gay studies, their overriding effect was to suggest that lesbians and gay men were a fixed minority deserving of legal equality.

Margrit Eichler, who submitted an affidavit and testified in court, argued on behalf of a 'functional definition' of family (later adopted by the Tribunal in Mossop), and stated that Karen Andrews' relationship met

⁸ Affidavits of Barry Adam and Mariana Valverde, Andrews v Ont. (Min. of Health).

the criteria for this (see Chapter 2). Offering the perspective adopted by Myers in Knodel, Eichler argued that Karen Andrews and her partner displayed qualities 'similar to' those exhibited by heterosexual 'spouses'.

In deciding Andrews' action, McCrae chose to ignore all the 'expert' interventions. From the judgment, one would not even know that he had been presented with this evidence. The Andrews decision refers only to the authority of dictionaries; sociology is deemed so irrelevant as to be unworthy of mention. Thus, despite the manner in which Adam and Valverde 'liberalised' their analyses⁹, and despite Eichler's attempts to offer a 'modern' family analysis to the court, these 'experts' would appear to have played little or no role in the judge's resolution of the complaint.

[3] E.E.O.C. v Sears (1986, 1988)

Two feminist historians appeared as 'expert witnesses' in this case - for opposing sides.¹⁰ One, Rosalind Rosenberg, testified as to women's internalisation of the 'cult of domesticity' (for the employer), the other, Alice Kessler-Harris as to how women have always performed non-

⁹ Their own academic writings are far more complex and radical, see, for example, Valverde (1985), Adam (1987).

¹⁰ See footnote above for description of the issues at stake in this litigation.

traditional labour yet suffer institutional discrimination (for the Commission).

There were two decisions in Sears, the first at Illinois District Court, the second at the 7th Circuit Court of Appeal. In the initial judgment, the District Court judge issued an 89 page decision in favour of Sears. The bulk of the ruling condemns the E.E.O.C.'s statistical evidence and lack of direct witness testimony of discrimination. Under a section entitled 'Other Evidence of Interest', the judge devotes four paragraphs and three footnotes to the appearances of the feminist historians (E.E.O.C., 1986:1314-15).

In the District Court judge's words, Kessler-Harris's testimony consisted of "bald assertions" with "little persuasive authority" (E.E.O.C., 1986:fn.63; 1314). She is accused of making "sweeping generalisations" from "isolated examples", focusing on "small groups of unusual women" (E.E.O.C., 1986:1314). The judge acknowledges that "some" women have always worked in non-traditional fields, but states that is not the issue in this case, which is concerned with the history and practices of the Sears company (E.E.O.C., 1986:1314).

Rosenberg, on the other hand, gave "convincing" testimony with "reasonable conclusions" (E.E.O.C., 1986:1315). Whilst his discussion of her testimony takes

up no more than one paragraph of the decision, the District Court judge clearly uses Rosenberg's conclusions to attack the basis of the E.E.O.C.'s statistical evidence.

In conclusion, EEOC's statistical analyses are dependent upon the crucial arbitrary assumption that men and women are equally interested in commission sales at Sears...the EEOC has provided nothing more than unsupported generalisations by expert witnesses with no knowledge of Sears to support that assumption...All the evidence presented by Sears indicates that men are at least two times more interested in commission selling than women (E.E.O.C., 1986:1315).

In the Circuit Court of Appeal decision, neither historian is mentioned by name, nor is their testimony referred to in any explicit way. In one paragraph (of the 58 page majority judgement), the 7th Circuit affirms the District Court's view of women's interests (E.E.O.C., 1988:321). The 'experts' that really concern the Court of Appeal are the statisticians - their testimony receives serious consideration. The one dissenting voice argues against the notion that women were never "interested" in commission sales jobs; however, this judge never refers to Kessler-Harris's evidence directly (E.E.O.C., 1988:360-2). Thus, the judgments in this case which occasioned so much feminist comment and distress, actually tended to ignore both the appearance of the historians and the primary intellectual debate in which they were engaged.

[4] Mossop (1989, 1990)

In Mossop, one of the first steps taken by the Tribunal adjudicator in her decision was to establish the authority of the 'expert witness', Margrit Eichler, upon whose testimony the Tribunal judgment rests. While 'expert's' qualifications are often briefly reviewed in reasons for judgment, here Eichler's academic and professional history was given in great detail. The reader is informed not only that Eichler holds a doctorate in sociology and is a "full" professor at the Ontario Institute For Studies in Education, but also that she holds two cross-appointments, has received "numerous research and development grants", and "has published extensively" (1989, 4.4).¹¹ We also learn she has written the only existing textbook on "families" in Canada, and that she provides consulting services to a host of public and private bodies (4.4).

The tribunal adjudicator, Mary-Elizabeth Atcheson, then incorporated Eichler's perspective on family within her opinion. She began by establishing a lack of "standard definition" and "consensus" with respect to the "evolving" concept of family (4.7,4.5). She went on to search for sources of meaning, finding the parliamentary record of little assistance as the Minister responsible at the time simply commented on what the concept "should mean, or might

¹¹ Paragraph numbers in brackets refer to the report as noted in the case list appendix.

mean, as opposed to what it did mean" (4.56). Atcheson's response to the Attorney General's argument that "the" meaning was "generally understood" was that Counsel adduced no evidence to support this contention and, further, that general understandings may be discriminatory and therefore not a valid source of meaning (4.59). The adjudicator also noted that law did not always reflect the reality of peoples' lives; simply because a relationship had not been heretofore recognised in law did not mean it should not be now (4.61). Atcheson further attempted to minimise the relevance of current legal provision specifically based on "opposite sex" relations (4.61).

The tribunal adjudicator concluded that the term "family status" was "not clear and unambiguous". Dictionary definitions, she added, may be reasonably consistent but they are broad, and often include non-marital and non-biological relationships (4.63). The Tribunal, Atcheson argued, did not need to select "the" "all-inclusive meaning", but only "a" "reasonable" meaning, one that "best accords with the Act" (4.67, orig.emph.).

Her final act of interpretation in this process was to find that the term "reasonable" was itself fluid, and hence "impossible of measurement" (4.70). She then put aside any formal 'test of reasonableness'.

As a practical matter, the Tribunal agrees with the Complainant that terms should not be confined to their historical roots, but must be tested in today's world, against an understanding of how

people are living and how language reflects reality. Dr. Eichler's evidence, as well as that of the Complainant, was helpful in making these assessments. Value judgments should play no part in this process because they may operate to favour a view of the world as it might be preferred over the world as it is.(4.70)

Atcheson's dilemma was that of the progressive liberal, faced with a case where the 'law as it is' did not 'go the way' that she wanted (see Kennedy, 1987). She must, therefore, develop a strategy that allowed her to ignore the range of prior cases and legislative provisions that clearly did not help Brian Mossop.¹² In the process, she articulated a broad liberal ideology that allowed her to over-ride and trivialise what had heretofore stood as 'precedent' on the subject of homosexuality. There was really no basis 'in law' for her decision - she must actively create new law and rely on other sources of knowledge to support her finding of discrimination.

Atcheson saw the Tribunal's task as one of performing 'value-free' adjudication, not imposing any conception of 'the good life' upon litigants (4.70). The Tribunal's society is a pluralist one, where the role of adjudicators is to protect the minority from "majoritarian" tyranny. No one group should have the power to impose its morality

¹² See Chapter 2 for discussion of these cases.

on others, all people are equal and are due equal rights and benefits.¹³

However, within this paradigm the "same-sex couple" is seen as equal to or the same as the heterosexual couple. Heterosexuality remains unchallenged as the unproblematic norm. The Tribunal adopted a 'same as' approach to counter the usual 'different than' analysis exhibited in earlier cases on sexual orientation. Atcheson recognised that these 'sameness' principles are what had animated Canadian liberal human rights law in the 1980s. However, these same principles had not yet been extended to the legal treatment of homosexuality. It was this failure of law, both judge-made and statutory (with some exceptions), that compelled the Tribunal to rely on the insights of sociology. Throughout Atcheson's decision, she underscored the compatibility of law and sociology.

The evidence of Dr. Eichler was that the term does not have one definition for all purposes. Sociology and law appear to be similar in this regard. (4.65)

In contrast, the Federal Court of Appeal, in judicially reviewing the Tribunal decision, made every effort to distance law from sociology. "Status", Marceau stated, was a "legal concept" (674). The "functional

¹³ See use of words and phrases like "harmony" (4.47) and "equal opportunity" (4.49). The Tribunal also expresses the liberal view that values "should play no part" in the adjudication process (4.70). For discussion of legal liberalism see R. Dworkin (1984); MacNeil (1989); Sagoff (1983); Sandler (1984). See also Chapter 2 and 3.

definition given by the sociological approach" was "ad hoc" and not "acceptable" (674). Marceau misrepresented the sociology of which he was critical, arguing that the "functional approach" had simply taken "some attributes usually ascribed to families" as being "the essence of the concept itself being signified". Eichler, on the other hand, had specifically maintained that family could not be reduced to an 'essence'.

At times, the Court's approach is quite derisive. Although the Tribunal had decided that Mossop and his lover constituted "sociologically speaking a sort of family", the Court held that no approach "other than the legal one" could lead to a proper understanding of what is meant by the phrase 'family status' (674).¹⁴ "Family", Marceau continued, did not have a meaning "so uncertain, unclear and equivocal" that it could not be defined (673). The word signified a "basic concept" that had "always been" (673). Non-biological formations had been rendered "normal" through marriage and other legal mechanisms, but these did not affect the "core meaning" of the word (673). Marceau described other meanings as "peripheral", "residual...analogical uses" (673).

¹⁴ See also Roger Cotterrell's (1986) discussion of the relationship between law and sociology as disciplines (although I do not agree that law is as 'closed' and self-referential a system as he makes it out to be).

Family, according to Marceau, was not a "fluid term" (674). As noted above, the "sociological approach" had missed the "essence of the concept" (674). There was, for the Court, a "generally understood meaning to the word 'family'" (675). This last point was legitimated through the judicial strategy of 'common sense knowledge'. Phrases such as "generally seen", "no one would want", or "generally understood" (673-5) were employed to persuade the reader of the 'normalcy' of the judge's views.¹⁵ This contrasted sharply with the Tribunal's explicit critique of such understandings as being potentially discriminatory. The Court then concluded its discussion of the meaning of "family status", by arguing that the "real issue underlying the complaint" was "sexual orientation" (675).¹⁶

For the Tribunal, the "real issue" or subject of the complaint began and ended with the meaning of 'family'. The question to be decided was whether or not Mossop and his partner constituted a 'family'. If so, they were

¹⁵ See Goodrich (1986) for discussion of how judges deploy linguistic techniques.

¹⁶ The Court disposed of this "real issue" by finding that although sexual orientation might be an analogous ground under S.15, the Charter could not be used as a "legislative amendment machine" to be read into human rights legislation (676). Only parliament can legislate the inclusion of sexual orientation in the Canadian Human Rights Act (675-8) (see Chapter 2 for explanation of various rights mechanisms). Stone, in his concurring judgment in the case, stressed that he would have considered Charter arguments seriously if they had been raised. Marceau's approach here has been explicitly challenged by the Ontario Court of Appeal's ruling in Haig (see Chapter 2).

clearly being discriminated against on 'family status' grounds as their "kind of family" (as Marceau later put it) was being denied a benefit given to others. Once having determined they were a family "sociologically speaking", there was little else to adjudicate (other than to diffuse the Attorney-General's arguments). The Tribunal was clearly not concerned with 'homosexuality' per se, but only its manifestation in a category called "same-sex couple". In fact, the entire Tribunal judgment functions to render sexuality itself invisible.

On the other hand, the judges of the Federal Court of Appeal refused to allow this. Their subject was indeed 'the homosexual' who, according to their interpretation, was the "real issue" missed by the Tribunal. Marceau insisted that it was "sexual orientation" which lay at the root of the complaint; his strategy of conservative judicial restraint allowed him to maintain the status quo of exclusion.

Marceau's political conservatism was apparent in more than his deployment of traditional interpretive strategies. In his analysis of why section 15 should not be read into human rights enactments, Marceau clearly expressed himself as a protector of the private sector.

For one thing, human rights codes impact on areas of the private sector of economic life which are not readily seen to fall within the scope of the Charter. It may well be that the legislatures who entrenched the Charter were willing to impose a more demanding standard of conduct on

themselves and on the executive than they would have decided to impose on the population at large...the Charter [does not] purport to restructure the global juristic background against which all private ordering takes place.(676)

This point was, arguably, simply one of principle, having no bearing on the case at hand. The Canadian Human Rights Act, which was, in Mossop, the statute being considered, applies to the federal government as employer, having nothing to do with the private sector (as do other codes). The Court was thus protecting the freedom of private economic ordering in a case that had nothing directly to do with this. Marceau was, perhaps, being strategic, hoping to persuade other courts, dealing with codes that do apply to the private sector, to follow his lead. However, the rhetorical use of this argument implies it was applicable to the case at hand.

This passage is one of the few to explicitly reveal the Federal Court of Appeal's conservative politics. For the most part, Marceau and his colleagues refrained from making obviously 'partisan' arguments, such as those expressed by McCrae in Andrews. As I noted above, McCrae based his finding that a 'homosexual partner' could not be a "spouse" on the 'fact' that homosexuals were unable to marry and procreate (Andrews, p.16,193). He argued that the government's definition of 'spouse' was related to the important objective of "establishing and maintaining traditional families" (Andrews, p.16,194). In Mossop,

Marceau is never quite this explicit, although these views are certainly implied within his search for the meaning of "family".¹⁷

For Marceau and McCrae, the law must maintain the status quo, it must not be used as a weapon of social change, and it must reflect the values and morals of patriarchal capitalism. These judges exhibit a 'small-minded' world-view, and they claim this view as representative of the 'common folk's' 'common sense', availing themselves of various conservative judicial techniques to underpin their decisions. Liberals, on the other hand, show an increased willingness to approach 'sexual orientation' with an 'equality' paradigm paramount, and to use expert knowledges as a means to an end.

[5] Judges and experts

Are there any conclusions one can reach about the role of 'expert' evidence and the politics of judging in these cases? I have suggested that in only one decision, that of the human rights tribunal in Mossop, did professional expertise appear to influence the decision. However, it is unclear whether Atcheson was persuaded by Eichler's analysis, or merely used it to confirm and legitimise a pre-existing view of lesbian and gay relationships. As the

¹⁷ As I discussed in Chapter 2, the Egan case is another example of a conservative approach to gay rights.

federal government chose not to present its own 'expert', Atcheson was spared having to explicitly dispose of contrary 'scientific' opinion. Contrary legal opinion she simply ignored. In Knodel, Rowles quoted from the psychiatric report extensively, but did not base her actual decision in Myers' arguments. Whilst in Mossop, at the federal court, sociology received the kind of treatment perhaps meted out by judges to 'new' sciences in the 17th century (see Kargon, 1986).

As Chesler et al. (1988:204-5) have noted, lawyers present 'expert' opinion in order to "convert" judges through a process of education. The research of Chesler et al. (1988), based on a study of American school desegregation litigation, is somewhat inconclusive. Some judges did report having been "converted", whilst others used social science evidence to legitimate the imposition of activist remedies (Chesler et al., 1988:208-16).

Whilst 'expert' evidence may have educational and reforming effects in some cases, this model of change rests upon the assumption that judges really are the 'neutral arbiters' of liberal discourse, and that, with 'correct' information, they will reach 'right' decisions.¹⁸ Several writers have argued, and I would agree, that in the majority of cases judges bring to court the politics and

¹⁸ As I discussed in Chapter 4, this is the model underlying some American conceptions of rights reform (eg: Minow, 1990).

vested interests that will lead them to certain decisions and not others (see Sumner, 1979).¹⁹ Expert witnesses will provide evidence legitimising these decisions, but are unlikely to cause much judicial "conversion". In Mossop, for example, the tribunal adjudicator was a feminist lawyer, one of the founders of the feminist legal action group LEAF (see also Atcheson, et al. 1984). Whilst feminist credentials by no means guarantee a pro-gay rights stance, the two do, often, go together.²⁰ Marceau, on the other hand, was a Federal Court justice with a history of conservative decision-making. Shortly before Mossop, he had even dissented in an opinion giving rights to unmarried heterosexual couples (Re Schaap, 1988). Karen Andrews believes that McCrae's decision in her case was rooted in religious beliefs (interview), although this is not evident from the judgment.

In lesbian and gay rights cases, what judges 'know' about homosexuality is less a consequence of 'expert' courtroom interventions, and more the result of the sexual politics they bring to the decision-making process; a politics informed by their social location and experience, as well as any or all of several other sources, including: religion, psychiatry, biology, feminism, and sociology.

¹⁹ See Olsen (1980) for a study of the Canadian judiciary as a 'state elite'.

²⁰ Arguably, female, especially feminist, judges are more likely to reach decisions favouring 'untraditional' families. Aside from Rowles and Atcheson, see Arbour's decision in Leroux (1990) and Dawson's in Leshner (1992).

Indeed, one possible interpretation of current lesbian and gay rights litigation is to view these cases as struggles between the new liberal professionals (who may also be elite participants in social movements), often holding positions within the legal process somewhat low in the hierarchy (such as human rights adjudicators), and the higher courts, still largely dominated by white, middle class, conservative men. Should 'out' lesbians and gay men come to be selected for judicial appointment, perhaps they will bring to case law development another 'new', local knowledge.

All this is not to say that judges are 'free' to come to any decision they want. The restrictions of precedent, appellate review, legal technicalities, and a host of other factors, all play an important role. The legitimacy of law depends, to a large extent, on the practice of 'stare decisis', the adherence to past decisions as legal 'truths'. Even when judges are extremely keen to overturn precedent with which they do not politically agree, there are strong cautionary compulsions. In the summer of 1992, the United States Supreme Court refused to completely overturn the Roe abortion rights decision, despite most of the justices having been selected for appointment on the basis that they would do so.

The Brown case (discussed in Chapter 2) is another such example, where the judge, despite his obvious sympathy

with the gay litigants, felt unable to offer them a remedy due to binding precedent. Although the plaintiffs were denied relief, Coultas' sympathy with them, and his implicit condemnation of the moralistic conservatism of the Social Credit government was apparant.

The history of western civilisation records that from biblical times to our own, homosexuals have been subjected to discrimination because of their sexual orientation. As with other forms of discrimination, it is unjust for it fails to take into account individual merit, character or accomplishment. The form and extent of it is uglier, the cry more shrill since the onset of AIDS. I accept that those who suffer HIV or AIDS, often very ill, are discriminated against and persecuted in various subtle ways, and some not so subtle at all. (Brown, p.309)

The comments of the B.C. Minister of Health were characterised as "unnecessary, inflammatory, and reflecting ignorance of the disease that one would not expect" (Brown, p.311). Coultas' concluding comments perhaps exemplified the best that liberal law had to offer.

I have found that the funding policy does not contravene the law. Nevertheless, I recognize that AIDS is one of the great tragedies of our age. It behoves those in private life and in government whose actions affect the well-being of those suffering the disease to act decently, fairly, compassionately. (Brown, p.322)

Coultas gives the impression here of someone who feels their hands are tied by the wording and existing interpretations of the Charter. His decision is thus more clearly an example of how judges are constrained than is the Tribunal ruling in Mossop where Actcheson virtually ignores the law that does not go her way.

The politics of judges, and the constraints within which these politics can be expressed, is key to understanding why they reach the decisions they do. However, it is also important to draw attention to the ways in which judges and other legal actors disqualify alternative accounts and interpretations (Smart, 1989), and also the hierarchy of 'expert' knowledges acknowledged by 'law'. By prioritising statistical and not feminist historical evidence, the courts in the Sears case indirectly demonstrated what qualifies as 'truth' and what was not worth even discussing. By stating that sociology is 'not law', the Federal Court of Appeal in Mossop both excluded sociology from being a valid source of knowledge and further created and solidified what was law itself. I noted in Chapter 5 that New Christian Right activists partly constitute their own identity through the vilification of 'others'. Similarly, law and its judges maintain their integrity only through 'knowing' what is not law, and who are not legal 'experts'.

Nevertheless, Margrit Eichler's prominence within Canadian lesbian and gay rights cases reveals the extent to which sociological analyses have supplanted psychiatric understandings in the formation of legal knowledge about homosexuality. Whilst conservative judges continue to emphasise the 'reproductive function' of 'traditional families', even they are now unwilling to engage in public discussions of homosexuality's 'causes' and 'effects'.

Instead, conservative judges simply rely upon well-established precedent denying rights to lesbians and gay men, whilst liberal judges, on the other hand, deploy sociological analyses in their attempts to make the law respond to 'new realities'. Legal discourse, once 'knowing' homosexuality only through the lenses of religion and conservative medicine, has slowly been influenced by 'new' ways of understanding social relations. And this, of course, is what evangelical Christians cannot accept.

C. Concluding Remarks

Sociology's increasing influence within legal constructions of homosexuality is on the whole, I would argue, something to be cautiously welcomed. As a discipline sociology is ostensibly concerned with social relations, group interactions, and structural dynamics, and hence less focused on individual pathologies. As several cases thus far demonstrate, adjudicators have deployed sociological analyses to show the historical discrimination and prejudice lesbians and gay men have faced. In this way, the harm, and even the 'illness', is seen to lie within society, and not 'the homosexual'. Within such an approach, lesbians and gay men are viewed as a legitimate collectivity struggling for justice within a social conflict paradigm, and not as 'poor unfortunates'. The lesbian or gay 'subject' of sociology is thus, potentially, an empowered, contextualised one.

Furthermore, sociology's potential to explain sexuality (and law) in terms which recognise its contingent and constructed character is witnessed by the fact that many oppositional writers have found a home in the discipline. In several of the cases I have described above, the 'experts' appearing in favour of lesbian and gay rights were feminist and gay scholars, many of whom had been active themselves within social movement struggles. These appearances are, on first glance, a positive development. If we want public institutions to take oppositional analyses seriously then we must surely welcome the increased prestige, status, and credibility that attaches to the work of such scholars as a result of their entry into legal arenas. This is particularly true where 'new' scholarship is informed by marginalised voices, ones emerging from the local experience and analyses of subordinated groups.

At the same time, there are also troubling effects to these kinds of developments. In Chapter 1, for example, I discussed my own ambivalence around the role of 'lesbian legal theorist', and in other chapters I have questioned whether lesbian and gay rights movements need or want 'spokespeople', and considered issues to do with cooptation, institutionalisation, and de-radicalisation. Furthermore, in this chapter I have argued that 'expert' evidence seldom convinces legal forums of anything and thus

we perhaps need to think more critically about the purpose of these interventions.

It is also important to note that 'sociology' is not a monolithic, uniform approach to understanding social relations. On the contrary, there are many different kinds of sociology; as Barry Adam (1986) has himself noted, mainstream sociology (eg: standard introductory textbooks, etc.) remains largely conservative in its approach to homosexuality. In Vogel, a 1992 trial court decision in Manitoba, the provincial government presented to the court its own 'sociological expert' who argued, in contrast to Margrit Eichler (appearing again), that lesbian and gay households were not 'families'. According to Dr. Lyle Larson,

...It has been established by social science scholars that the universal family may be defined as 'a kinship group normatively defined to carry out the nurturant socialization of dependent children...that basic thing about a family is that it involved children. It involves children. It always involves children...The basic characteristic of [marriage] [is] that it involves a male and a female and that involves the potential for the eligibility for procreation. (Larson's testimony cited in Vogel, 1992)

In adopting this definition, the judge in Vogel implicitly accepted that lesbians and gay men did not and could not have children, and, presumably, that 'infertile' heterosexuals could never form families either. The judge and his expert went even further, declaring that "a majority of social scientists and a majority of society do not as yet approve of homosexual relationships in the

context of marriage or as a vehicle for raising children" (Vogel, 1992).²¹

Vogel shows that 'sociology', like psychology, biology, and other 'expert knowledges', has its conservative side, and its entry into legal constructions of gay rights will not always be uniformly positive. Furthermore, I have also indicated, in cases such as Mossop and Andrews, that oppositional analyses of sexuality may be watered down in order to be judicially palatable. Nevertheless, sociology can potentially turn law's gaze away from 'individual pathologies', sympathetic or hostile, and towards the 'ills of society'. Is the binary opposition of heterosexual/homosexual at all brought into question as a result?

²¹ I am not here concerned with questioning the reasoning in this decision, which, it seems to me, is obviously flawed even upon traditional standards of 'logic' and 'rationality'. The Vogel decision is not, for the purposes of Canadian lesbian and gay rights jurisprudence, an influential one. Of far more significance is the Ontario Court of Appeal's judgment in Haig (1992) which, again, relied upon expertise presented by a 'progressive' sociologist. How the Supreme Court of Canada responds to Eichler's evidence in Mossop will also be of great interest in determining the extent to which feminist sociological understandings of 'family' are accepted within gay rights cases.

AFTERWORD

For radical gays or lesbian feminists, one test of the 'merits' of lesbian and gay rights reform might be whether such activities lead to the overthrow, or at least the destabilisation, of heterosexuality. When I began asking the questions that led to my taking on this research (see Chapter 1), providing some kind of response to this was part of my motivation. In much of this thesis, however, I have suggested that we cannot predict with any certainty the effects our actions will have. For example, long-term consequences often contradict short-term gains; engagements between opposing social movements may produce unexpected results; particular, perhaps temporary, configurations of power enable or constrain possibilities; and the ways in which social identities and practices are shaped by inclusion within certain kinds of legal regimes can never be anticipated fully.

Nevertheless, in this afterword, I wish to reflect upon what has come before, and suggest some possible ways of thinking about the challenge posed to heterosexuality by struggles for lesbian and gay rights. I do this by examining the potential effects of lesbian and gay rights reform upon two concepts at the heart of many law reform campaigns: 'minority', and 'family'. In previous chapters, I have discussed the relationship between law reform and

social movement mobilisation; I have also considered when and how a radical sexual politics can be publicly communicated during legal struggle. Here, whilst I pick up some of these points, I am more concerned with shifts in the meanings of the concepts themselves, and the effects of these shifts upon broader ideologies and practices. By this I mean, did the dominant understandings of 'minority' or 'family' change through the struggles of lesbians and gay men to be included within their terms? Did these struggles entrench or undermine dominant paradigms? Or, are these questions posed too starkly; is it even possible to make such an assessment. One way of thinking about the challenge, if any, posed to heterosexuality is to trace the trajectory of 'minority' and 'family' within lesbian and gay campaigns for legal equality.

'Minority'

The demand to include 'sexual orientation' within a list of protected grounds in human rights law often succeeded in entrenching a 'minority rights paradigm' with respect to lesbian and gay sexuality. This, in turn, strengthened a belief in the 'immutable nature' of sexuality, and thus left unquestioned the inevitability, normalcy, and 'majority' status of heterosexuality. In the Bill 7 example, the mobilisation of lesbians and gay men, to the extent it took place, was short-term and tended to exclude the expression of more radical perspectives. For

example, oppositional analyses of sexuality were marginalised, and radical activists may have been alienated by the campaign's embracement of liberal politics. From these observations, one might conclude that I see nothing but gloom and doom in struggles to include 'sexual orientation' provisions within existing human rights regimes.

However, Bill 7 was but one example of such a reform initiative. Other similar struggles may afford different opportunities and achieve contradictory results. I have no doubt that this is the case. In this thesis, I have offered an analysis of only one such lobbying campaign. There are also, however, other ways to complicate the analysis of Bill 7 I have set out above. Does including the category 'lesbians and gay men' within the concept of 'minority' succeed in shifting the very meaning of 'minority', and, as a result, challenge the 'naturalness' of its 'majority opposite'? The 'minority paradigm' is most frequently expressed within liberal discourse. The latter, I have argued, often assumes a hegemony within struggles for lesbian and gay rights reform and it is, therefore, this understanding that I shall focus upon.

The dominant liberal understanding of 'minority', affirmed by human rights law, is of a group of people with a shared culture and history. The deployment of the term reveals its necessary opposite - majority. Within human

rights regimes, 'minorities' are peoples 'different from' the majority norm, who have been afforded official 'protection' from bigotry towards them. As applied to sexuality, the minority paradigm has constructed lesbians and gay men as a homogenous group; one permanently consisting of small numbers of people with little or no control over the characteristic that defines them as a minority - sexual orientation. Within liberal approaches to 'minority', the 'naturalness', inevitability (for the majority), and (implied) superiority of heterosexuality is not questioned. Furthermore, the minority paradigm does not tend to consider sexuality as a field of regulation and, hence, social construction.

I would argue that, at first glance, these dominant understandings of 'minority' have not been seriously undermined by lesbian and gay rights reform in Canada. The inclusion of 'sexual orientation' within existing human rights legislation has simply extended a liberal paradigm to lesbian and gay identities without subverting it. At the same time, this inclusion has facilitated the expression of 'immutability' arguments within the mainstream lesbian and gay rights movement. Rather than making people question what we mean by 'minority', struggles such as Bill 7 succeed in entrenching biological explanations, and binary oppositions.

Lesbian and gay rights activists are increasingly jettisoning 'psy' discourses for those of sociology (and history); however, little disruption to the minority/majority opposition has occurred as a result. Although it is no longer popular to talk about the 'lesbian and gay minority' as sick, perverted, and/or pathetic, it is still considered appropriate to use uncritically the term 'minority'. There are simply 'new' defining characteristics of the minority: geographical space; social and cultural institutions; and a 'history of persecution'. Heterosexuality, and the forces which render it nearly unavoidable, are not obviously undermined as a result. Does this, however, have to be the case?

I would suggest that whilst there is nothing inherent within anti-discriminatory legislation that necessitates expressing a minority paradigm, the form these kinds of laws take, as I noted in Chapter 3, facilitate its adoption. Nevertheless, lesbian and gay rights campaigners, rather than strategically accommodating liberal themes, could instead choose to articulate different rationales, justifications, and arguments. The ability, or practicality, of doing this will vary according to circumstances.

For early 'homophile rights' activists, relying then upon the insights of liberal psychology, the demand for inclusion within liberal conceptual paradigms was a radical one (D'Emilio, 1983:244; see also Marcus, 1992). The idea

of suggesting that these 'lesbian and gay rights pioneers' should have exhorted society to overthrow heterosexuality seems fatuous. Arguably, however, we have moved on from then. The ground paved by these earlier activists has enabled 1990s lesbian and gay rights reformers, perhaps, to contribute towards a 'paradigm shift' in our understandings of sexuality. This will not be appropriate for all societies and cultures everywhere; for some, perhaps, conventional reforms must come first. Indeed, that is the argument made in different contexts by many of the rights-defenders noted in Chapter 4.

However, in countries such as Canada, where conventional rights reforms have had some success in shaping 'new' social climates, 'new' agendas may be desirable. A strategy to dis-articulate 'minority' from hegemonic liberal discourse might help to challenge dominant understandings of 'minority' as a concept, together with the accompanying 'naturalness' of the 'norm'. If the 'lesbian and gay minority' were represented less in terms of sexual difference, and more in terms of a political opposition, than the meaning of 'minority' in this context might indeed be shifted. Unfortunately, from my perspective, this is unlikely to happen. In North America, the mainstream lesbian and gay rights movement has, to a large extent, institutionalised a liberal approach to reform. Law reform tends to be an activity largely engaged in by professional lobbyists who advocate

on an 'interest group' model (see Merrett, 1991). Many of these reformers publicly argue that lesbian and gay rights are exactly about 'the right to be different', and not about 'troubling' heterosexuality or heterosexuals.

Although I have thus far suggested that achieving a 'right to be different' succeeds in affirming dominant liberal paradigms, the extension of these paradigms to 'new' identities may have several positive effects as well. There are, for example, benefits in terms of the distribution of resources. Given that, in countries such as Canada, some resources are directed towards groups which have officially achieved 'minority' status, lesbians and gay men are able to draw on these for community projects. Furthermore, the social identity of 'minority' may facilitate resistance, mobilisation, and opposition by fostering a certain consciousness and solidarity amongst identity-holders.

If the addition of 'sexual orientation' to human rights laws, on whatever terms, signals an increasing social acceptance of homosexuality, this might, in turn, have an important impact upon young men and women contemplating their own sexual identities. In other words, as Brian Mossop suggested (see Chapter 4), the official visibility of lesbian and gay identity might lead to more people coming out. If this were so, the meaning of 'minority', as applied to homosexuality, might indeed shift

as heterosexuality's claims to universal truth were undermined. Related to this are other effects such as the increasing confidence and strength of those already claiming lesbian or gay identities, and the corresponding panic of conservative Christians forced to explain and justify 'God's Plan'. In the long-term, then, it may be possible to argue that the fixity of the minority/majority opposition is in fact cracked by the extension of the liberal minority paradigm to lesbians and gay men (see also Weeks, 1985:195-201).

Family

My comments on the positive effects of achieving 'minority' status, are also, arguably, true for the official recognition of lesbian and gay families. In this section, then, I wish to focus upon whether, or how, dominant understandings of 'family' have shifted through lesbian and gay rights reform in this area.

In several chapters, I argued that legal cases, such as Brian Mossop's, had indeed succeeded in de-stabilising conventional definitions of 'family'. Lesbians and gay men, by insisting that our relationships were as valid as heterosexual units, and as entitled to be described by the ideologically meaningful word 'family', had contributed to a social climate in which it was possible to talk about non-traditional family configurations. As a result,

conservatives were on the defensive, forced to rationalise what had previously been taken as inevitable, and 'natural'.

Brian Mossop and Ken Popert's claim for "family status" has helped to open up for discussion the meanings and purposes of one of society's most fundamental concepts. Their legal challenge is explicitly directed at shifting the dominant understandings of 'family', thus rendering the heterosexual unit less able to claim superiority. Other similar claims, to 'spousal' pension or health benefits for example, raise the kinds of concrete issues often marginalised by more abstract human rights struggles. Demands which are perceived to implicate the distribution of 'real' benefits and resources are often far more controversial than adding 'sexual orientation' to a pre-existing list within legislation widely recognised as ineffective anyway.

At the same time, however, there are those who would argue, as I have done previously (Herman, 1990), that the 'family' model is itself conservative, and exclusionary. By adopting the qualities perceived to be held by the idealised heterosexual family, lesbians and gay men simply reinforce and affirm this idealisation. If, as many feminists argue (eg: Barrett and McIntosh, 1982), this dominant familial ideology is a key ingredient in the subordination of women, then such a strategy by lesbians and gay men is fundamentally antithetical to 'women's'

interests.¹ In this sense, then, the meaning of 'family' has not really shifted; rather, it has simply, as I argued with respect to the concept 'minority', been extended to include certain 'approved of' relationships within lesbian and gay communities. In the process, the dominance of 'coupledom', and the qualities such couples exhibit that are akin to traditional marriage, are affirmed (see also Smart, 1984). Marriage, and its foundation - heterosexuality - are not very bothered.

One argument against this interpretation can, however, be drawn from the work of Judith Butler (1990). She has suggested that all sexual identities are 'performances'. For example, gay drag, she argues, is a parody. But it is not as copy is to original, but rather is as copy is to copy. The process of performance "troubles" the 'naturalness' of sexual/gender categories by revealing them to be what they are - constructed, and inherently unstable.

..."the original" is revealed to be a copy, and an inevitably failed one, an ideal that no one can embody (Butler, 1990:139).

Within such an analysis, the legal recognition of lesbian and gay families is not so much the approval of a mimicking of the idealised 'norm' so much as a 'troubling' of it. Certainly, the vociferous opposition of conservatives to lesbian and gay familial claims might

¹ I recognise the problems with this phrase, see Chapter 1.

suggest this. One of the key 'secular' arguments made by conservatives against the legal recognition of lesbian and gay families is that children will not be given appropriate gender role models. Children, if they have two mothers or two fathers, rather than one of each, will grow up confused about their gender role in life.² The implication of this argument is that the official affirmation of lesbian and gay families may thus contribute to the deconstruction of gender itself.

Furthermore, although I have previously suggested that human rights challenges tend to entrench the public/private divide by locating the source of problems in the state or 'public' realms and leaving the site of 'family' unaddressed (Chapter 4), it is also possible to view lesbian and gay family challenges as transcending this dichotomy. Brian Mossop's claim, for example, centres on work-related discrimination; however, in disputing the employer's benefits policy, Mossop and Popert are also effectively highlighting 'the family' as an area of contestation. I think that there is much to be said for these more generous interpretations (see also Weston, 1991); however, at the same time, the problematic effects of lesbian and gay family rights remain.³

² A version of this argument is also used against 'single' heterosexual parents.

³ And, as Butler herself notes, "parody by itself is not subversive" (1990:139).

Despite the de-stabilisation of the traditional family, it remains the case that uncoupled lesbians and gay men, or those whose relationships do not fulfil the 'functions' of Margrit Eichler's 'families' (see Chapters 2, 7), are excluded from the group seeking inclusion. As many feminist theorists have advocated, entitlement to social benefits should not be based on the degree of intimacy attained with a 'significant other'. Rather, the privileging of marriage can be challenged by policies which, for example, allow individuals to designate a person, any person, as a co-recipient or beneficiary. This would avoid the need to 'prove' relationships were 'familial'; it would also remove from judges the power to issue authoritative definitions in such cases.

I would suggest again, however, that this is, perhaps, a 'next stage', rather than an alternative strategy. The official acknowledgement that lesbians and gay men form important, positive, useful personal relationships may need to precede rights or entitlements being offered on a different basis. Furthermore, in areas such as immigration law for example, it is difficult to envision alternative standards coming into play in the near future. Nevertheless, the rights claims of lesbians and gay men, by undermining the dominance of traditional family forms, assists in creating a climate where this might be possible.

Concluding Remarks

One question somewhat beyond the scope of this thesis is the relationship between the lesbian and gay rights movement and other social movements on the left struggling for social change. I believe that the undermining of heterosexuality, and eventually the deconstruction of gender itself⁴, is a necessary part of any larger project of social transformation. I have argued, however, that lesbian and gay rights reforms may not achieve this, or may do so partially and with ambiguous effects. At the same time, not all such reforms inevitably challenge other set of social relations, such as those based on economic class or race. On the contrary, these hierarchies are reproduced within lesbian and gay communities.

I would suggest that there is no necessary link between rights for lesbians and gay men, and the transformation of social relations not premised upon sexuality. Rather, I would agree with Laclau and Mouffe (1985) that diverse social movements must build "chains of articulation" - create mechanisms and processes whereby the 'other' is identified with, and the interests of individual groups are seen to be shared by all. For lesbians and gay men, this means moving beyond 'interest group' politics. Lesbian and gay struggle, in legal arenas and elsewhere, ought to be broad, encompassing, and inclusive.

⁴ By this I mean dissolving 'male' and 'female' categories currently perceived as 'fixed'.

Individuals are made up of complex identities, some often contradictory. When we argue for rights as a fixed 'minority', claiming that we were 'born this way', we simultaneously imply that our demands 'stop here'.

In interviewing lesbians and gay men for this research, I was struck by how most seemed not to have thought about what they hoped to achieve in the long-term. Although 'the future' can be neither planned nor predicted, it may be useful to encourage debate around values and visions (see also Weeks, 1991:183). For example, do we want the freedom to live out an essential 'self' within existing frameworks of social relations? Or, are we fighting for substantial shifts in these relations themselves?

The 'lesbian and gay rights problematic', I would argue, is about underlying political analyses and about the power relations that shape the terms of equality. Rights-claims are neither inherently radical re-articulations nor dangerous and diversionary. More often than not they are neither, occasionally they may be both. To say that rights are difficult, complicated tools for social change does not mean that the struggle for their acquisition is doomed or that 'real issues' are being obscured. At the same time, an unreflexive seeking of rights and yet more rights may not bring about the changes to social relations many of us would like to see.

APPENDIX A

TABLE OF CASES

(all reports are Canadian unless otherwise noted)

B.C.L.R.	British Columbia Law Reports
C.C.C.	Canadian Criminal Cases
C.L.L.C.	Canadian Labour Law Cases
C.R.	Criminal Reports
D.L.R.	Dominion Law Reports
F.T.R.	Federal Trial Reports
F.2d	Federal Reports (second) (U.S.)
F. Supp.	Federal Supplements (U.S.)
L.A.C.	Labour Arbitration Cases
N.R.	National Reports
O.R.	Ontario Reports
R.F.L.	Reports on Family Law
S.C.R.	Supreme Court Reports
S.Ct.	Supreme Court Reports (U.S.)
U.S.	United States Law Reports (U.S.)
W.W.R.	Western Weekly Reports

Action Travail des Femmes v C.N.R.C. et al. (1987), 76 N.R.
161 (S.C.C.)

Andrews v Ont. (Min. of Health) (1988), 49 D.L.R. (4th) 584
(Ont. H.C.)

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Big M Drug Mart (1985), 18 D.L.R. (4th) 321 (S.C.C.)

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Rights Commission [1976] 3 W.W.R. 385 (Sask.Q.B.)

Bowers and Hardwick, 196 S. Ct. 2841 (1986) (U.S.S.C.)

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(B.C.S.C.)

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349 U.S. 294 (1955) (Brown II) (U.S.S.C.)

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S.C.R. 573 (S.C.C.)

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(S.C.C.)

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Egan and Nesbitt v Canada (1991), 47 F.T.R. 305 (F.C.T.D.)

Gay Alliance Toward Equality v Vancouver Sun [1979] 2 S.C.R. 435 (S.C.C.)

Haig v Canada (Min. of Justice) [1992], [not reported at time of writing] (Ont. C.A.)

Hunter v Southam (1984), 11 D.L.R. (4th) 641 (S.C.C.)

Klippert v The Queen, [1967] S.C.R. 822 (S.C.C.)

Knodel v B.C. (Medical Services Committee) (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.)

Leroux v Co-Operators Insurance (1990), 71 O.R. (2d) 641 (Ont. Ct.), rev'd. [1991] O.J. No. 1554 (O.C.A.)

Leshner v Ontario (1992), [not reported at time of writing] (Ont. Hum. Rgts. Trib.)

Morin v National Special Handling Unit Review Commission (1985), 49 C.R. 260 (S.C.C.)

Mossop v Dept. of Sec. State (1989), 89 C.L.L.C. 16,041 (C.H.R.T.); rev'd. (1990), 71 D.L.R. (4th) 661 (F.C.A.)

North v Matheson, (1974), 20 R.F.L. 112 (Man.Co.Ct.)

O'Malley v Simpsons-Sears [1985] 2 S.C.R. 536 (S.C.C.)

Oakes (1986), 26 D.L.R. (4th) 200 (S.C.C.)

P.B. v P.B. (1988), [unreported] (O.P.C.F.D.)

Plessy v Ferguson, 163 U.S. 537 (1896)

Re Carleton University and C.U.P.E., Loc. 2424 (1988), 35 L.A.C. (3d) 96 (Ont. Arb. Bd.)

Re Schaap et al. and Canadian Armed Forces (1988), 56 D.L.R. (4th) 105 (F.C.A.)

Re Vancouver Sun and Gay Alliance Toward Equality (1977), 77 D.L.R. (3d) 487 (B.C.C.A.)

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Robichaud v Canada [1987] 2 S.C.R. 84 (S.C.C.)

Roe v Wade 410 U.S. 113 (1973) (U.S.S.C.)

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Vancouver Sun v Gay Alliance Toward Equality (1976),
[unreported] (B.C.S.C.)

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74 (F.T.D.), aff'd.

Vogel v Manitoba (1983), 4 C.H.R.R. D/1654 (Man. Bd. Adj.)

Vogel v Manitoba (1992), [not reported at time of writing]
(Man.Q.B.)

Watkins v U.S. Army, 875 F.2d 699 (9th Cir. 1989)

APPENDIX B

TABLE OF STATUTES

Canadian Charter of Rights and Freedoms, Part I of the
Constitution Act, 1982, being Schedule B of the
Constitution Act 1982 (U.K.), 1982, c.11.

Canadian Human Rights Act, R.S.C. 1985, c.H-6.

Health Insurance Act, R.S.O. 1980, c.197.

Human Rights Code, S.O. 1981, c.53 as amended by 1986,
c.64. s.18.

APPENDIX C

INTERVIEWS

Judy Anderson, President, REAL Women of Canada, 18 December 1991

Karen Andrews, Litigant, 17 December 1991

Chris Bearchell, Bill 7 Campaigner, Coalition For Lesbian and Gay Rights in Ontario, 19 December 1991

Ian Binnie, Legal Counsel to REAL Women et al., 10 December 1991

Gwen Brodsky, Legal Counsel to EGALE et al., 4 December 1991

Margrit Eichler, 'Expert Witness', 20 December 1991

Don Hutchinson, Legal Advisor, The Salvation Army, 10 December 1991

Brian Mossop, Litigant, 16 December 1991

Ken Popert, Litigant, 16 December 1992

James Sclater, Director of Public Policy, Focus on the Family Association (Canada), 6 December 1991

APPENDIX D

INTERVIEWEES' COMMENTS ON TEXT

realwomen

"Women's Rights Not at the Expense of Human Rights."
Realistic Equal Active for Life

Toronto, Ontario.
M5S 2L4
November 4, 1992.

Ms. Didi Herman,
Department of Law,
Keele University,
Staffordshire
England ST5 5BG

Dear Didi,

Thanks for sending me these notes. Considering I don't have the full context, I've done the best I can to be sure I'm accurately represented.

My notes are hand-written for speed as I'm sure you'll want a response sooner rather than later.

Your bias is fairly clear; I've marked the areas with which I have difficulty.

I'm enclosing a few articles you'll find of interest.

I look forward to hearing from you again.

Sincerely,

Judy Anderson

— It is worth considering NCR leaders' own explanations for the process of legalisation that occurred for the coalition members in Mossop. According to Judy Anderson, Jim Sclater, and Don Hutchinson, there could never be any question of submitting an overtly Christian document to the courts (interviews). They and their organisations view society as profoundly anti-Christian, and hence their political communication must be informed by other knowledge sources in order to be publicly credible. Judy Anderson, for example, argues that,

Christianity is allowed to be lambasted at every opportunity...things can be said about us you can't even say about gays any more...Christianity is low man on the totem pole, anybody can give a kick and get away with it. We're at the back of the bus now...everywhere Christianity is derided and treated with disrespect (interview).

As I left her house following this interview, Anderson pointed to a Christian prayer she had hanging in her front hallway. She

* Did we discuss this? What is your documentation that shows I "was unable to understand ... being out". If you leave this in, the corollary is that the homosexual, political agenda has certainly greatly reduced (and will continue to reduce) respect for and even tolerance of traditional values. At base, our goals are diametrically opposed. Does that mean we're mutually principled or mutually intolerant? Your comment, in fact, appears to suggest that one side in this debate is principled, while the other is intolerant. I think this statement is a good example of the one-sidedness I described.

told me that every time someone came to interview her she considered whether or not to take this prayer down and hide it, knowing that this symbol of religion could lead journalists and researchers to "totally dismiss" her. She likened her feelings to those of closeted lesbians and gay men, who "were" (in her view) once reduced to similar 'sterilisation procedures' (my interpretation) in their homes. Now, she feels the tables have turned. For Anderson, neither group should be in such a position (interview) (although she seemed unable to understand how REAL Women's potential success could substantially reduce the possibility of lesbians and gay men being out).

"homosexual activism" with "radical feminism" - together these two currently pose the greatest conspiratorial threat.⁵⁷

The view that major institutions are run by a "cultural elite" is echoed by REAL Women's Judy Anderson. For this organisation, ^{a significant segment of} the conspirators are clearly ~~and solely~~ identified as "radical feminists".

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...feminism has a lot of clout politically these days, the media certainly supports feminism almost 100%...we can't even get our point of view into the media most of the time...CBC won't touch us with a ten-foot pole...Mossop has his cheerleaders in the media, 99% of the media are on his side...the CBC is just one left-wing, socialist, feminist point of view, newspapers are little better. (Anderson, interview)

"Feminist ideology" (Anderson, interview) has infiltrated into government and the courts as well. ^{*} REAL Women attributes their public funding difficulties to the placement of "radical feminists" in key governmental positions.

...the Secretary of State's Women's Programme is mainly run by feminists...LEAF gets all the money, we're strapped for cash always...the radical feminists got \$11 million dollars from the Secretary of State last year, we got \$6,900...one ideology is given amazing amounts of government funding to promote their agenda through the courts and people like us are out in the cold...feminists have gotten control of funding at all sorts of levels and they're pretty keen to hold onto it...the Prime Minister's appointments secretary is in

* See enclosed article by Rob Martin

that network, his access is very much cut off to people like us... (Anderson, interview)⁵⁸

The courts, as well, have replaced legal analysis with "sociological treatises" best exemplified by the "feminist ideology" of Bertha Wilson (Anderson, interview).⁵⁹ [also see Martin's article - enclosed]

I have to give the radical feminists credit, they saw all this, they were involved in bringing the Charter in, men lay down and put their legs in the air - said, okay, you can have what you want - they got section 15 in there behind closed doors, I have to give them credit politically, it has changed the face of society, they got into the seat of power and grabbed it (Anderson, interview)⁶⁰

For Anderson, "radical feminists" have achieved levels of power REAL Women members can only dream about. The membership's ~~perceived~~ experiences with funding applications and news coverage have taken on a life of their own; "radical feminist" power is identified as the cause of the organisation's political marginalisation, media 'trashing', and legal losses. The "radical feminists" have been constructed as the primary enemy; during my interview with Judy Anderson, we were ostensibly discussing the Mossop case, however very little of Anderson's anger was directed at the 'lesbian and gay rights movement'. For the underlying philosophy of individual licence vs communal obligations and the fallout of her, feminism and 'gay rights' seemed one and the same.

A number of LEAF lawyers are lesbians, they're free to be lesbians, but I think there's a bit of a conflict *documented in Saturday Night magazine?*

* This can be documented. Did I tell you the lesbian mothers' story I have a media discrimination file a few inches thick; the Fraser Institute's (Vancouver) media monitor has also documented the media bias against REAL Women.

of interest with their cases, getting my tax dollars to intervene in something very close to their own backyard. (Anderson, interview)

... conspiracy is called "secular humanism", "radical feminism", or "homosexual activism", both Focus on the family and REAL Women clearly believe that it dominates all the major social institutions; the marginalisation of their own perspective leaves them feeling, as Anderson put it, "down a dark hole" (interview). As is characteristic of those who believe there is only one Truth, any view or action which does not support the tenets of conservative Christianity is taken as being indicative of the conspiracy's power.

⁶² See Chapter 6.

⁶³ See 'Commentary: What Happened to the Family', The War, 27 May 1989, p.2.

NOT! (to paraphrase from Wayne's World, the movie); this is extreme and does not reflect reality.

[2] Creating the REAL Women et.al. Coalition

The impetus to form a Christian intervention coalition in Mossop came initially from Jim Sclater and Focus on the Family.¹⁴ Following the publication of the Tribunal decision in Mossop, and the indication that the Government would appeal, Focus decided the issue was significant, and that they, and others, should get involved in some way. Jim Sclater called the Justice Department and spoke to Barbara McIsaac, senior counsel on Mossop, who indicated, he states, that the "government didn't have much of a case" (interview). Focus, who believed that a strong argument against the re-definition of 'family' to include gay couples could surely be made, began to contact fellow Christian activists.

¹⁴ The following account is based upon interviews with Jim Sclater, Don Hutchinson, and Ian Binnie, coalition lawyer (with McCarthy Tetreault).

① Gay and lesbian activists are now allowed to proselytize in the Toronto public high schools. I've seen the curriculum which contains a great deal of propaganda, e.g., notwithstanding the documented negative consequences of such relationships, ad-hoc, non-binding relationships are extolled over "static (sic) obligatory bonds (a.k.a. marriage)". I find this offensive, but I as a Christian would be denied the opportunity to teach any understanding of marriage in a public school classroom. This is equality? After discovering that a number of other organisations were

already involved in legal interventions, and thus could not play a leading role in Mossop, Sclater, who had been referred to the prestigious Bay Street firm McCarthy Tetreault, decided that Focus's resources permitted them to act as instigator. Focus and REAL Women had worked together in the past, and were at that time involved in setting up the Legal Defense Fund; RW was thus a natural partner for Focus to contact. The Salvation Army became involved through McCarthy Tetreault; the firm was the Army's general counsel, and had relayed to them Focus's interest in Mossop. Eventually, the other two members, The Pentecostal Assemblies of Canada and the Evangelical Fellowship of Canada, both with active histories in opposing lesbian and gay ^{claims to} equality, ② joined up as well. As various interviewees expressed it, activists wished to have a mix of organisations 'known' to the courts as intervenors (eg: REAL Women) but also with long, respectable histories (eg: Salvation Army).

The intervening organisations never met as a group, although there was some phone contact between individual leaderships, and Focus and REAL Women met at their pro-family conference in the spring of 1991. Judy Anderson asked me to tell her with whom REAL Women was intervening, [as she had no idea] (interview). Whilst Don Hutchinson of the Army stated he was "aware of the doctrinal beliefs of the other organisations" (interview), it was clear to me, in conversation, that his knowledge of Focus on the

I believe I was aware of Focus & the Salvation Army - certainly I was not in the least surprised by our collaboration

The next page was not supplied.

Despite not being able to meet and discuss the case, both Don Hutchinson and Jim Sclater expressed satisfaction with how McCarthy's was handling the matter. Hutchinson and Ian Binnie, counsel from McCarthy's, had worked together to ensure that the legal submissions did not engage in "gay bashing"; each took great pains to insist that the case had "nothing to do with gay rights" (Hutchinson, interview). Of all the organisations, then, it is the Salvation Army that played the most instrumental role vis a vis the legal submissions. Don Hutchinson felt that the factum was "a good reflection of our [eg: the Army's] position" (interview). Jim Sclater, on the other hand, acknowledged having very little input into the drafting of the factum, and Judy Anderson had never read it, [much less influenced its content] (although neither expressed dissatisfaction).¹⁶

↳ this is not true; Gwen and I are in constant contact and would have discussed the philosophical, social and legal ramifications of homosexual empowerment many times.

¹⁵ Interestingly, Ian Binnie, McCarthy's lawyer on the case, similarly knew very little about Focus on the Family. He noted, however, that the participation of the Salvation Army gave the entire coalition credibility with the courts which they might not otherwise have had (interview).

¹⁶ It should be noted that Anderson responded to all specific questions on Mossop by referring me to Gwen Landolt, a lawyer, and founder and Vice-President of Realwomen. For someone who was national president, she seemed singularly uninformed.

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There seems to be a concerted effort here to present me as an ignoramus; I think you are being unfair. As the National President of REA Women, I was very aware of the philosophical & much of the legal and social ramifications of this case. It is not my function to deal with the nitty gritty details of our litigation; I have competent legal advisors, one being my National Vice President, Gwen Landolt, to whom I referred you. I entrust these women with the details of our legal cases; they look after the details of intervenors, funding and factums. My not knowing the day-to-day details of this case is no different from what you would find if you interviewed the CEO's of the majority of various political organizations. You chose not to interview them, which baffles me. In fairness, the sentence "for someone... uninformed." should be removed. over →

A
I'd also like to point out that my position as National President of REAL Women is entirely voluntary; unlike my opposite equal, Judy Rebeck of NAC, whose \$50,000 salary I help pay, I make not a penny as President of REAL Women. I also work full-time as a special education teacher as mine is the main wage in our family (my husband was unemployed for 2 years during the last recession). Somewhere in all of this, I'm also a wife and the mother of 2 young daughters. I make no pretense of being Superwoman. In contrast to the Egale et al. coalition,¹⁷ which was funded

by the Court Challenges Programme thereby confirming the NCR "court party" and conspiracy theses, this intervention is being funded by the organisations themselves; McCarthy's has agreed a ceiling for each intervention (at the Federal Court, it was approximately \$17,000). According to Jim Sclater, primary funding comes from the Salvation Army, with the Pentecostals and the Evangelical Fellowship assuming a certain amount as well (Sclater, interview). Judy Anderson did not know how the litigation was being funded (interview). Don Hutchinson, of the Army, insisted that the Army's share was not being funded out of publicly raised monies; when pressed to say where the money came from, he suggested that sources included income from Army property and investments (interview), (clearly sources which were, at some point, raised through public donation or state subsidy).

→ If you were really interested in the financial details of our litigation, Gwen Landolt could have told you; I don't see that this sentence furthers your thesis unless part of it is to discredit me. I would suggest, for fairness, that this sentence be removed.

It's somewhat late in time, but Gwen Landolt could have provided a very interesting and knowledgeable perspective on this case. It's interesting that in all cases but ours, you spoke not to the Presidents of the organizations, but to those directly involved in the litigation, as Gwen was with ours.

More than the other organisations, REAL Women has identified participation in Charter litigation as key. Judy Anderson, president of REAL Women, argues that "courts are now the main avenue for social change, since the Charter" (interview). However for Anderson, participation in litigation is hindered by the "radical feminists" who control the funding sources (interview). For example, the Court Challenges Programme, a federally-funded, arms-length body that awarded Charter litigation funds to applicant groups, refused REAL Women funding on the basis that the organisation sought to restrict, rather than enhance, equality. The Programme was, for Anderson, part of the "radical feminist" conspiracy: "all the people who administer the funds are quite partisan" (interview).⁸ *They also believe they have a monopoly on the meaning of equality. By what authority do they claim to be so exclusive? I thought this kind of privilege was the preserve of the Old Boys' Network!*

(1988) research, referred to above, indicates that conservative Christianity is the common bond of REAL Women supporters. Consider also, the words of Judy Anderson, current president of the organisation.

...[for] those of us who are Christians,²⁷ religious faith is very important...[but] one of the last things I'm going to do unless asked about it is talk about my faith...Christianity is low man on the totem pole, anyone can give a kick at Christianity and get away with it....an amazing amount of people would totally dismiss me, oh, she's just a Christian, she's just a fundamentalist, so, I don't go out there and talk about my faith - why would I? It's the whipping boy now...we're pretty careful about putting our faith on the front burner...we're all going to be pretty careful about where and when we talk in those terms. (interview)²⁸

JUDY ANDERSON: President of REAL Women, has similar views.

I'd like to see a Charter of responsibilities rather than a Charter of Rights...the Charter of Rights pits group against group, ideology against ideology...rights have become paramount to everybody...the Charter creates a more selfish society, [it's] win/lose and makes society more polarised, makes people less willing to compromise (interview)

Anderson's opinion of other ^{so-called} human rights legislation is also largely negative. Whilst she believes in the idea of having human rights laws, she characterises the Ontario Human Rights Commission as "social engineers" and "Big Brother", telling me a story about a friend who has been, unjustly in her view, charged with race discrimination under the Code and "intimidated" (interview).

* The case against him was dismissed earlier this year. I'd appreciate it if you would revise your wording to reflect this.

God's design. Judy Anderson argues that "sexual orientation" and "lifestyle" are two separate issues (interview). Thus, while there may be people unfortunately born with a proclivity towards the 'wrong' practices (this would be a sign of the Fall), they can always choose to try and overcome their 'disability', rather than exploit and celebrate it.

could
that

I'm married, I've been attracted to other people in my seventeen years of marriage, I made a choice, I'm either true to my husband, and my vows - I make a choice...we're talking lifestyle (Anderson, interview).

?
For (NCR) activists, it must be difficult to imagine that their own children could possibly be born homosexual - that is not God's plan. God created male and female, to complement each other, and created heterosexual union through marriage as the

⁶⁹ I discuss in chapter 4 the problems around defining what is meant by 'rights'.

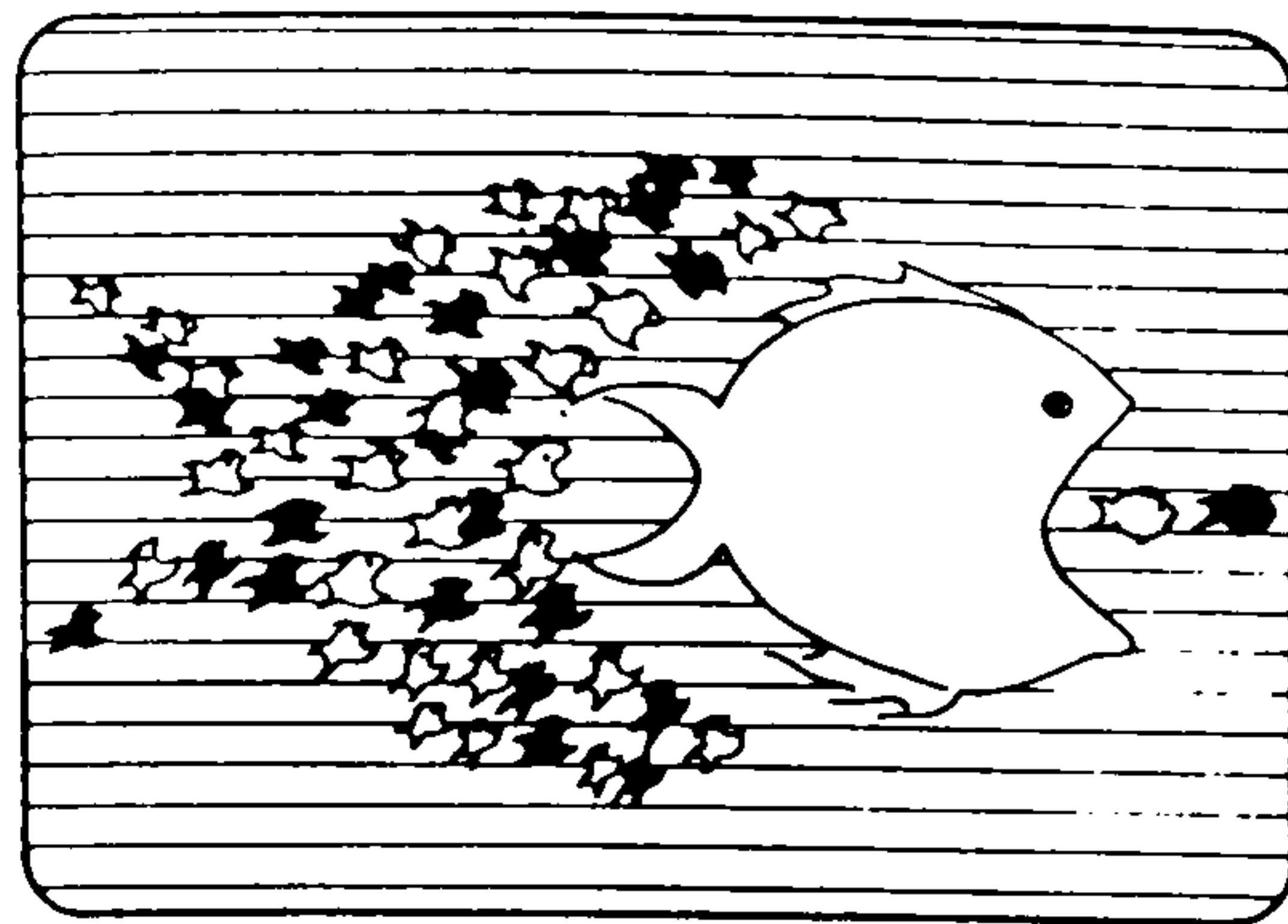
↳ sounds interesting!

Partially as a result of this perceived bias, REAL Women views the Charter as an unqualified evil [which they only argue about because they have to]: "instead, we say, get rid of the Charter" (Anderson, interview). For Anderson, the Charter is undemocratic, providing "five people" (a majority of the Supreme Court) with "no accountability to the public" the opportunity to "in one fell swoop change the whole force of Canadian jurisprudence and social norms" (interview). Echoing many of the Charter criticisms made by marxist legal academics (discussed in Chapter 4), Judy Anderson argues for "more grassroots participation" (interview). Anderson's comments are based upon her perception that the Supreme Court of Canada has adopted the "radical feminist" agenda. When asked whether, should the Court be staffed by judges more to her liking, she would still have the same views about the Charter she replied, whilst the process would continue to be undemocratic, "if things were going our way we might not be saying it quite so loudly" (interview). Nevertheless, were it not for the funding problems, REAL Women would happily make litigation "one of our primary strategies" (Anderson, interview).

I believe I mentioned that the Charter of Rights and Freedoms is supposed to protect my freedom of belief and expression. I believe I alluded to the irony that the very groups which so often use the Charter to promote their agendas seem, in the pejorative view they reserve for their political enemies, to disregard their Charter rights. The ways in which conservative Christians tailor argument to audience is reiterated by Judy Anderson.

I can write from a religious point of view, my own faith, or I can take the same thing and say it not using the code words for religion...if I'm going to talk to the Catholic Women's League, sure, I'll talk about faith there because we all understand it, but if I'm talking to the Royal Canadian Yacht Club, I can say the same thing, but without using my own particular faith language (interview).

Charter seems to be applied quite selectively & groups like ours are routinely excluded from access to public funds. This is equality & freedom?



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September 1, 1992

BY FAX:

Ms Didi Herman

Oxford, OXZ 6RW
United Kingdom

Dear Didi:

Re: Draft Thesis Received on August 7, 1992

Thank you for sending me a draft of your thesis. I focussed mainly on the pages to which you directed me, but also found other parts of it to be of interest. I have some comments about the parts that relate directly to me. I am dashing this off quite quickly so that you get some feedback from me as soon as possible.

Initially, I thought I would have all my comments typed out, but I have decided it is quickest to send my handwritten comments on the relevant pages of your draft, except for a lengthy insert for p. 15 of c. 4. I hope this is OK with you.

I was sorry to miss you when you were in town. I would still like to have a chance to talk to you about the hearing in the Supreme Court of Canada. It was really exciting, and I think I can safely say that for the scores of lesbians and gay men who sat in the courtroom it was an "empowering" experience. To end your inquiry prior to the Supreme Court of Canada hearing is premature. I also hope that you might have a chance to interview my clients. They are in a good position to say what the importance of this litigation is. I commend you for conducting some interviews to try and assess the broader impact of the Mossop litigation, but I do not think you have talked to enough people (from our camp) to accurately answer your questions.

Your draft has helped me advance in my thinking about movement litigation. I have come to realize that I perceive a major difference in the litigation that I do on behalf of social movement groups and the litigation that usually gets done, mainly on behalf of individuals rather than groups, and mainly along very traditional lines, with the lawyer in charge.

Insert C-4, p. 15

Brodsky is critical of *Charter* litigation that is divorced from the equality rights movement, and is generally critical of the *Charter*, to the extent that liberal ideology combined with disparities in resources for litigation encourage individual rather than community-based *Charter* litigation. However, Brodsky has little time for 'rights critics' who, from positions of privilege and inaction, stand in eloquent and hostile judgement

of the strategies employed by disadvantaged groups to try and overcome their inequality. She points out that the ever-present challenge for disadvantaged groups whose concerns are marginal to mainstream politics is to find a way, sometimes any way, to have their protests heard and taken seriously. A familiar refrain of some rights critics is that the interests of disadvantaged groups can be better served by elected representatives in the political arena than by an unelected, elite judiciary. However, for members of disadvantaged groups such as lesbians and gay men this assertion frequently rings hollow. The reality is that there is very little difference between the legislatures and the courts. Their respective composition is mainly white and male, and liberal ideology is no less hegemonic in the legislatures than it is in the courts.

For more than a decade lesbians and gay men have sought legal protections against sexual orientation discrimination, under the *Canadian Human Rights Act*. Mainly, they have pursued non-judicial strategies. They have confronted politicians and pleaded with them, written lobbying letters, signed petitions, walked in parades, given media interviews, and spoken about lesbian and gay rights issues at conferences. Still, the federal politicians do not respond by enacting the remedial legislation that is needed. What are lesbians and gay men supposed to do in a circumstance such as this, when the political process does not work? The *Charter* at least gives people an alternative forum, and a means of achieving legitimacy and a public profile for their issues. It so happens that on the issue of human rights protections against sexual orientation discrimination, the courts have been more progressive than the federal government (for example *Haig and Birch*, August 6, 1992, Ontario Court of Appeal). However, it is not only the Courts' rulings in cases such as *Haig* that persuades Brodsky that the *Charter* is worthwhile, notwithstanding its shortcomings. She also points out that there remains the possibility that the federal government will exercise its override power and effectively circumvent the Court's ruling in *Haig*. She says there is another test of the *Charter's* value which is whether it promotes solidarity, hope, confidence, lively discourse, and diverse political actions within the equality rights movement. Brodsky believes that there are signs that the *Charter* has begun to do all of these things:

... the possibility of increasing rights,

Would you like me to send you the text of my oral argument, presented in the SCC?

Best wishes. Good luck!

Yours sincerely,



Gwen Brodsky
Barrister & Solicitor

GB:ca
Enclosure

Brian Mossop argues that when he and Popert appeared on radio shows about their case, callers wanted to talk about "homosexuality", not rights, or law, or litigation. The ability to do this, gain access to the media to talk about homosexuality, was the whole point of the action.

The main audience is the youngest generation of people who are listening, people who maybe have not come out yet...who are worried about what life holds in store for them. We go on the radio and say - here we are, we're a gay couple...it doesn't have to be all that bad...maybe you could consider telling one of your parents...the whole point is for people to come out earlier and earlier and earlier...(Mossop, interview)

For these gay litigants, a case which they have lost on appeal (Mossop, 1990) has been an unqualified success. They find the concerns of academics completely irrelevant. In response to a question about how radical analyses of sexuality are excluded from legal processes, Ken Popert stated that he doesn't "particularly care what is said in factums, or in court" (interview). ⊗

you might ask Mossop what he thinks about factums after the SCC hearing. I think he was quite P.S.

factums, after the SCC hearing. I think he was quite P.S.
 Certainly, this is not true for all those involved in lesbian and gay legal struggle. Karen Andrews, whilst critical of academic endeavours, nevertheless expressed some interest in legal arguments made on her behalf (interview). The coalition of progressive organisations intervening in the Mossop case (see Chapter 2) are taking great care with the writing of their legal submissions. For Gwen Brodsky, the lawyer acting for the coalition, getting the right language, tone, and politics is crucial (interview).

Developing the legal arguments, she says, should be a participatory, educational, expressive exercise.

impressed with what we did, and not at all impressed with "his" lawyer's presentation. There was a major protest about the name of the commission's lawyer.

C-4

is critical of
However, even Brodsky has little time for the 'rights critics' who do not differentiate among various models of litigation. She believes such writers are far removed from the concerns of "disadvantaged people" (interview). In contrast to much critical theory on the Charter, for example, Brodsky argues that the Charter's advent has encouraged social movements to build coalitions and think about what equality means in the concrete. *However, one argues that Charter litigation is frequently destructive. However, one argues that Charter litigation can be empowering and constructive if it is properly handled. She believes*

SEE INSERT

...the possibility of increasing rights, to take steps to secure more rights, has helped the community-based organisations to mature, and has given them a focus that they didn't have before. It has created both the opportunity and the necessity to try and figure out what's being talked about in any given circumstance where equality is the essential objective. Ten years ago, I don't think there were conversations in community organisations about what equality meant. The lobbying was more ad hoc, there was not much opportunity to figure out unifying themes....(interview)

Interestingly, Brodsky closely ties these developments to the Court Challenges Programme which, until 1992 (subsequent to the interview), provided public funding to groups seeking to challenge discriminatory laws.

...if there hadn't been any money available through the Court Challenges programme to allow groups to undertake litigation, and to have national consultations to formulate their positions in the litigation, the Charter would not have had the effect I'm talking about at all...to the extent those funds exist, they have fuelled an interest among the community organisations to better understand their own positions...and that's empowering, to even have the sense that there's a chance of success in an effort to secure increased rights. (interview).

In contrast to Ken Popert, Brodsky believes the factum-writing process to be an important one for the social movement organisations involved. What the judges think of it, whilst important, is not the only issue. Preparing a legal submission

C-4

on behalf of diverse interests has been, according to Brodsky,
a growing and learning experience for all participants.

It's a very different experience to try and do litigation that is respectful of the clients, ^{that} is an empowering experience for them, ^{that} does place control in their hands; ^{it's} that's a very different thing from the traditional model of litigation...really listening for hours and hours, going away and re-drafting a factum 12, 15, 20 times, sending it out to 10, 15, maybe 20 people, who then send it out to their boards, sub-committees...it grows and advances as we work, in the process of talking about what our position ought to be, how to express it, the different co-intervenors have heard one and other...the factum really will be a collective effort. In a situation like this, you just don't release it until you have something that people are prepared to say is theirs. All of them. To claim it. (interview)

For these groups and their legal counsel, the goal is not 'to get on the radio', but to collectively share knowledge and experience, and, eventually, write a document that all can feel is "theirs" -that does not advocate equality for some, at the expense of others (Brodsky, interview).

- I have argued elsewhere that the availability of public funding is critical to effective enjoyment of Charter rights by members of disadvantaged groups.

Brodsky's comments suggest that critical scholars have perhaps devoted insufficient attention to the ~~necessity of~~ positive role of ~~public funding~~ ^{federal} funding programmes in facilitating social movement ^{public} networking. Progressive writers often focus on how state funding constrains and co-opts actors and movements (eg: Findlay, 1987, 1988; Schraeder, 1990); however, Brodsky argues that this was not the case with the Court Challenges Programme. Administrators usually acted in an arms-length fashion, and did not attempt to control or police the organisations they funded. However, at the time I interviewed her - prior to the cancellation of the Programme - Gwen Brodsky also noted that Ministry bureaucrats were increasingly attempting to assert control over the

labour activities, such as secondary picketing, by not protecting them under Charter grounds. Various writers have noted and been critical of the capacity of the Charter to effect any positive change in the social conditions of working life (see Glasbeek and Mandel, 1984; Glasbeek, 1989; Fudge and Glasbeek, 1992).

Aside from case results, it would be difficult to argue that Charter litigation, and its attendant rights rhetoric, have assisted in the mobilisation of the working class, or in communicating class analyses to the wider public. At the same time, the courts have used the Charter to fill out the legal personality of corporations, giving them rights, religions, and so on. In very few ways, has the Charter effected any erosion of corporate power or profit. Hence, the almost universal Charter denunciation by marxist legal theorists.

On the other hand, a majority of feminist lawyers clearly view the Charter's advent as a good thing for women. Whilst some academics, notably those writing within a marxist tradition, remain critical in this area as well, most others, particularly since the Law Society (198) decision rejecting reverse discrimination complaints, are pleased and hopeful. Not only with results, but, as Gwen Brodsky argued above, with the capacity of Charter litigation to mobilise social movements, and open up avenues of communication, not only between movements and 'the public', but between movements themselves. Many activists within lesbian and gay movements agree.

1017 ~~Notwithstanding the mixed results of Charter litigation~~
 Notwithstanding that privileged groups have benefited more from the Charter than disadvantaged groups, ^{also as a group} ~~disadvantaged groups~~ ^{need} ~~the Charter~~ because the performance of governments is 36% ^{so}
 poor. At the Charter gives disadvantaged groups a voice when governments refuse to listen.

No doubt, if cases involving complaints of sex discrimination were decided differently, if feminists felt they were not getting anywhere with Charter litigation, the overall assessment would be quite different. Conversely, as Judy Anderson of REAL Women remarked, under different circumstances, should REAL Women perceive cases to be going its way, they might not be offering criticisms "so loudly" (interview).

→ I am quick to argue that ~~the~~ the Charter has not produced

As I argued at the beginning of this chapter, the debate is not so much about rights, or charters, or codes, but about underlying political analyses and visions and about who has power to define the terms of equality. For socialists, it is not the Charter that is the problem, but the prevailing liberal ideology of courts and legislatures. This is how I read the point made by Joel Bakan (1991) in his reply to those who write about how the Charter could potentially be interpreted. Certainly, socialists could give rights documents any number of interpretations - unfortunately, the Charter is in different hands (see also Chapter 7).³¹

However, it could be argued that feminism, at least certain 'brands' of feminism, have colonised liberal ideology with much greater success than have marxist class perspectives. This would not be the case for all capitalist democracies, but it may well be true for Canada, where the state has for some years been, at

³¹ As I explain in Chapter 6, however, the New Christian Right would vehemently disagree with this statement. They argue the courts are controlled by socialist feminist gay rights advocates.

more legal gains/losses for women. (See eg CDN Charter Equality Rights for Women)
Brotsky + Day, One Step Forward or Two Steps Back? However the tally of wins cannot be taken as an adequate of the Charter's impact. ³⁷

C-4

cannot as easily get away with saying now. This is important, and not something to be derided or dismissed.

Shifts in meaning over time (Gusfield, 1981), are also evident in other areas. Law initially offered 'homosexuals' no 'private' realm whatsoever. The Wolfenden reforms, won through the campaigning of early 'homophile rights' organisations, constructed a narrow arena in which homosexual (usually male) sex was to be de-criminalised. More recently, demands for lesbian and gay rights in the areas of adoption and fostering, reproductive technologies, and a whole host of other 'family sphere' areas, have confronted the liberal Wolfenden consensus (Cooper and Herman, 1992). The 'public/private' distinction is no longer tenable; hence, the opposition such 'rights claims' meet.

On the other hand, there is other evidence to support the position that not all equality struggles offer the same opportunities. For example, Chris Bearchell argued in Chapter 3 that the Bill 7 campaign successfully mobilised and politicised lesbians and gay men. Both Brian Mossop and Ken Popert agree that their litigation has not done this, and that individual legal cases are not good mobilisers (interview). However, the Bill 7 campaign, in contrast to Mossop's litigation experience, exhibited almost no public discussion of sexuality, homo or hetero. Prevailing rhetoric, engaged in by amendment supporters, simply re-enforced elements of liberal ideology - tolerance, privacy, minority protection, and so on. As I argued in the

You should talk to the reps for the Intervener groups (my clients) to see whether participation in this litigation was "mobilizing" or otherwise positive.

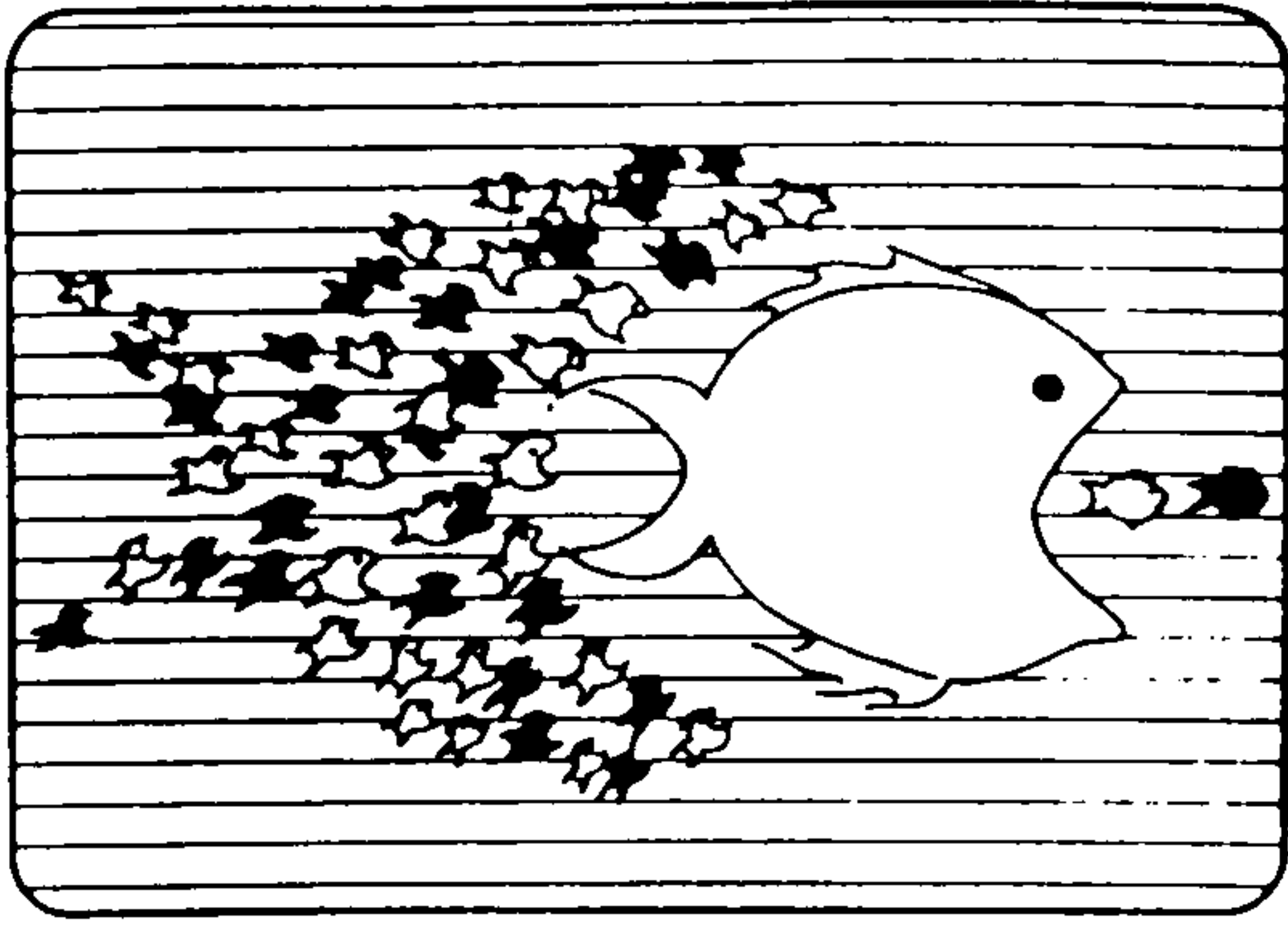
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previous chapter, this was as much a deliberate, pragmatic decision on the part of amendment campaigners as it was an exclusionary quality of a particularly powerful discourse.

This last point is worth pursuing. To what extent do progressive forces even attempt to introduce oppositional analyses into their political, including legal, struggles? Do social movements assume they must work through dominant frameworks of meaning, even as they consciously dispute their authority? To what extent do opposing social movements, such as those of feminism and conservative Christianity, share a rejection of liberalism, whilst maintaining a pragmatic, instrumental approach to achieving liberalism's overthrow?

Didi —

→ I don't think you do credit to our factum or our process if you do not distinguish us, here. We did not just assume that we had to "work through dominant frameworks of meaning." For example, we consciously rejected a formal equality paradigm for the basis of our case, and in our request for a remedy.



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September 3, 1992

Ms Didi Herman

United Kingdom

B. Your Paper

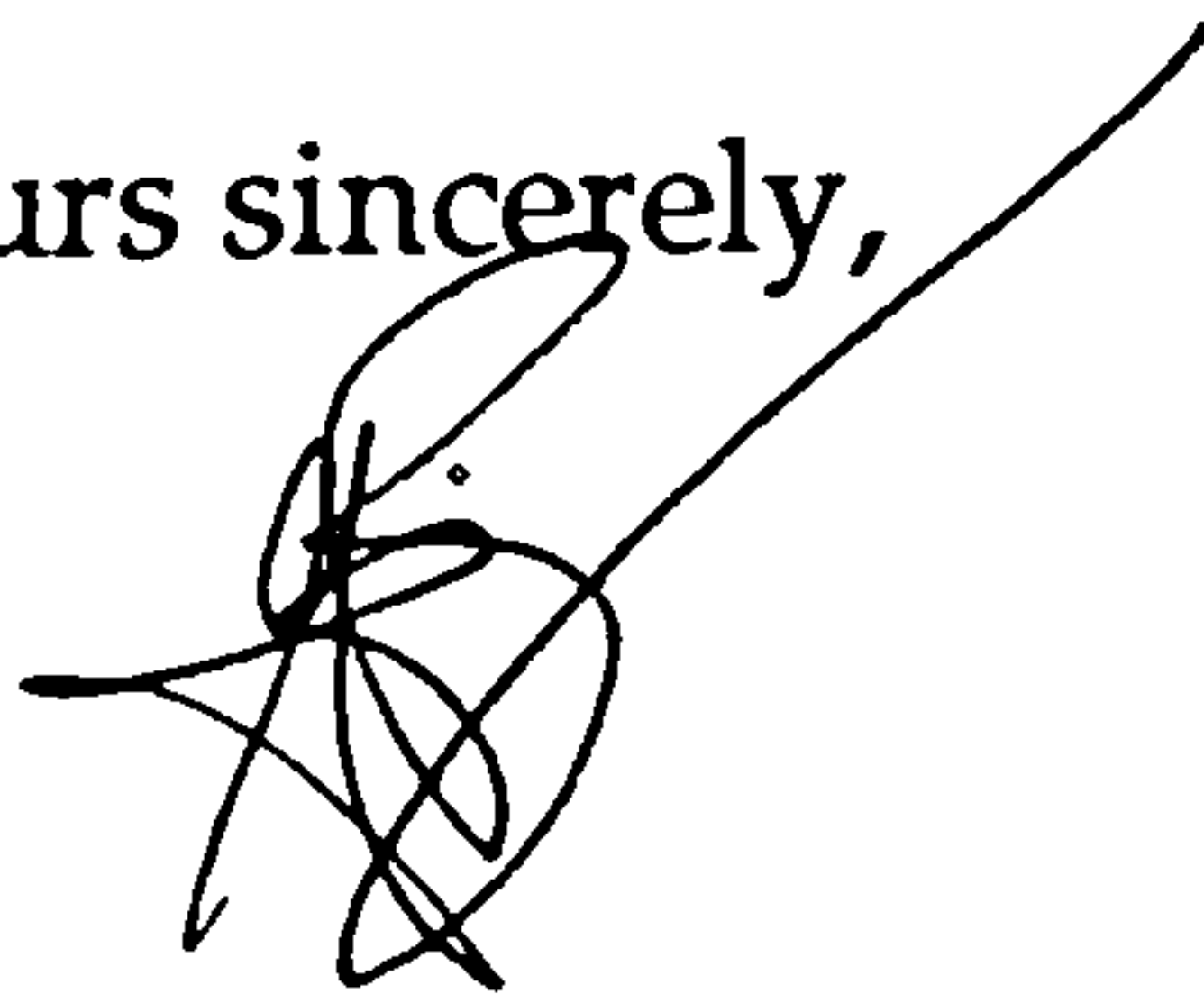
When I read your paper (which I think is excellent) I understand that you are concerned with the relationship between law and social change, in a major way. Yours is a valuable inquiry, to be sure. I don't think I understood well enough what you were working on, at the time of our interview. I may have become more reflective, of late. In any case, when I read your paper I think I come off sounding naive and much more positional than I actually am, with respect to the rights debates. The fact is that I think you are absolutely correct when you say "the relationship between law and social movements is complex. Our understandings are not helped by historical, abstract,

prescriptive contributions -- whether they be those of the rights critics or rights defenders." I do not want to be guilty of these sins nor do I want to be perceived as being guilty of them. Therefore:

1. I retract the following statement contained in my September 1, 1992 letter to you, concerning the August 7, 1992 draft of your thesis: "However, Brodsky has little time for 'rights critics' who, from positions of privilege and inaction, stand in eloquent and hostile judgement of the strategies employed by disadvantaged groups to try and overcome their inequality." Some other time I may write something about the work of particular rights critics, and meanwhile I should refrain from making inflammatory generalizations about them.
2. "Beyond the Rights Debate" p. 11: I am astonished and not comfortable to be labelled a "*Charter*-enthusiast". I do not regard myself as a "*Charter*-enthusiast", particularly. Where the *Charter* is concerned, I prefer to think of myself as a thoughtful realist. I believe that the *Charter* can have a positive role in struggles for progressive social change, but that in order for its potential to be achieved *Charter* litigation needs to be: rooted in community-based politics, combined with other political strategies, and regarded critically by its users. The *Charter* has the power to effect change, whether that change be regressive or progressive; that is why I have devoted energy to arguing in favour of progressive interpretations, public funding for access to *Charter* rights by members of disadvantaged groups, and increased accountability on the part of government respondents in *Charter* cases. I also believe in the value of allowing the voices of marginalized groups to be heard. This is what I try to do, through *Charter* litigation. I am not of the school of people who "think that with the *Charter* in place all we have to do is cook up imaginative legal arguments and go to court for the realization of an egalitarian and just society" (Joel Bakan, *Canadian Bar Review*, 1991 Vol. 7, p. 328.) Does anyone belong to this school?
3. In the same vein, I wonder what you intend to quote from me, if anything, on p. 12 of your paper?

In closing, Didi, as you can probably tell I am finding your work helpful to me. I hope that I am being helpful to you in some way, too, and not just a nuisance.

Yours sincerely,



Gwen Brodsky
Barrister & Solicitor

GB:ca

Enclosure



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Nancy Rowell Jackman Chair in Women's Studies

November 4, 1992

Didi Herman
Department of Law
Keele University
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Dear Didi:

Thank you for sending me the excerpt of your thesis which refers to your interview with me. I like the way you used it. Upon reflecting back on my last experience (the Vogel case) I would strengthen my expressed dismay even more. In that case, I felt that scholarly definitions were misused in a serious manner by the other side, and there was no way in which I could make this statement. I actually tried doing it, and was told that my business was to answer questions, not to ask them. Yet questions always rest on certain assumptions, and if one cannot challenge these assumptions, a very important aspect of truthfinding has been eliminated.

In any case, I am glad you are writing your thesis. Good luck!

Yours sincerely, ♥

A handwritten signature in cursive script, reading "Margrit Eichler".

Margrit Eichler
Nancy Rowell Jackman Chair in Women's Studies



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November 26, 1992

Ms. Didi Herman
Keele Univeristy
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ST5 5BG

Dear Didi:

MOSSOP

I have reviewed the excerpts from your draft thesis which were sent to my attention in October. I have numbered them H1-H7 and commented on them accordingly. Enclosed are the originals which were sent to me.

Hi

You comment:

"However, for the Army, litigation is increasingly being seen as another way of expressing a political message."

The Salvation Army does not see litigation as a way of expressing a political message. Our involvement in litigation of a nature involving social responsibility is in order to ensure a full presentation on the issues being addressed by the courts. In the Mossop case this was necessary. In other cases it has not been required.

You state:

"The Army now 'budgets' for litigation and Hutchinson insists that no other area of Army service suffers as a result..."

Of necessity, the Army budgets for litigation. With 12,000 employees and over 1,800 properties including churches, social service institutions and residences, it is necessary to have a litigation budget. Part of the litigation budget may be accessed for intervention in social policy issue cases where there is a clear understanding of a Biblical issue which we feel requires presentation.

The quote you use should read (as per the transcript which was forwarded to you):

Law is one of many ways to communicate your concern. Of course our primary concern is to share the Gospel in our word and deeds. That sharing and coming to positional statements on a number of issues on which there is a Biblical perspective takes place in a number of

"Have you read The War Cry?"

William and Catherine Booth
Founders

Eva Burrows
General

Wesley Harris
Territorial Commander

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Didi Herman
November 26, 1992

Page 2

different ways. One of those ways is lobbying the government. One of those ways is appearing before the courts. One of those ways is the Sunday morning Holiness meeting or the Sunday night Salvation meeting or midweek Bible Study. One of those ways is providing soup to people commonly referred to as street people. One of those ways is having a van that travels downtown Toronto looking for teenagers in need and specifically ministering to teenagers. There are a number of varieties and a number of ways which we try to minister. Law is one of them.

In this instance the full quote displays the separation of these various ways of ministering in a way that does not reflect any sense of primacy.

H2

The editing of the quote in this instance leaves out a crucial component of the statement. I will pick up with your editing and indicate the portion concerned in bold type:

...the Christian faith has worked hand in hand with **the societal development to recognize the need and the granting of certain rights for people.**

H4

It is probably not appropriate to indicate that certain individuals who were interviewed by you would represent the organizations who selected them to do the interview and others would not. The sentence worded:

"Having said this however, it should be remembered that Hutchinson's comments to me in an interview do not necessarily represent the views of the Army's membership."

Might more properly state:

"...may not necessarily represent..." .

I suspect the "newsletter" you referred to is The War Cry which might more properly be referred to as a "newspaper" or "weekly paper".

H5

H6

H7

I am not certain that it is accurate to say:

Didi Herman
November 26, 1992

Page 3

"The Pentecostal Assemblies of Canada and Evangelical Fellowship of Canada have "active histories in opposing lesbian and gay equality."

It might be more accurate to state that both have had active histories in promoting the evangelical position on social issues. Your statement is so broad and general as to be necessarily inaccurate.

I note the asterisk beside comments attributed to me in regard to REAL Women. I believe my comments were in regard to the overt political nature of REAL Women and the fact that The Salvation Army is apolitical. The "problems" were in regard to associating ourselves with a highly political organization. In any case, these comments were made clearly off the record and I suppose that is why you asterisked them. I would prefer that the statement "that 'they were the ones we have the most problems with' not be in your final thesis.

It should be noted that primary funding came from:

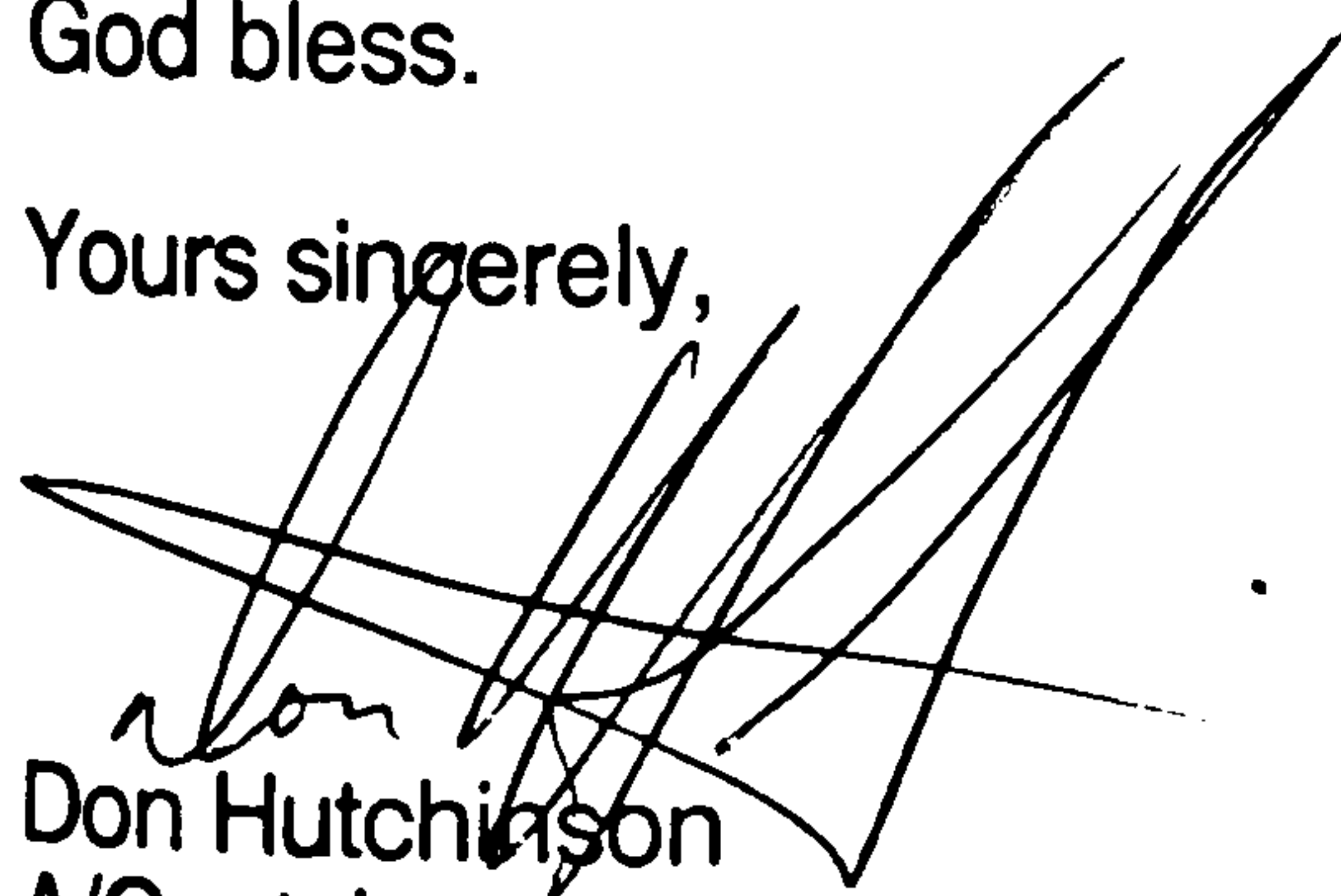
"Focus on the Family and The Salvation Army with the Pentecostals and the Evangelical Fellowship..."

Further it should be noted that The Salvation Army's "property and investments" financial sources are sources who's originating funds come from internal Salvation Army collections, i.e. Sunday offerings from Salvation Army Corps. Your choice of wording conveys the impression that these funds may have been diverted from the purposes for which they were raised. Within The Salvation Army there is a procedure whereby each Salvation Army Corps (Church) tithes (sends 10% of internally generated funds) to its Divisional Headquarters and Divisional Headquarters tithes to Territorial Headquarters. This provides funding for administrative oversight, including such matters as legal expenses.

Trust the above to address any concerns which you might have had in forwarding portions of your draft thesis to me. The Salvation Army is prepared to assist in underwriting the cost of your thesis to the extend of paying the full cost, including mailing, of one copy of the final thesis to my attention.

God bless.

Yours sincerely,



Don Hutchinson
A/Captain
LEGAL ADVISOR

DH/kh

5 October 1992

Toronto Ont M4K 1H4
Canada

Didi Herman
Oxford OX2 6RW
UK

Dear Didi —

Thanks for the chance to amend our words — no changes needed.

I took the time to read your paper and was (pleasantly) surprised to discover there's been so much published discussion on the meaning of equality rights movements. That just shows how little communication there's been between activists and intellectuals (or academics at any rate).

Two points that came to mind as I read:

- I find it frustrating that so many leftists (intellectuals and activists) are locked into an “either/or” way of looking at the world when, if they paid any attention to the intellectual foundations and history of the left, they would know that “both/and” should be their approach.
- On page 25 you pose the question “Is the minority model of homosexuality ... necessarily a positive, progressive one?” You might be interested to know that this has all been argued before. In the '70s there was debate as to the right path to take to gay and lesbian liberation: to reify homosexuality as a group of people (a sexual minority) or to “liberate the homosexual in everyone.” Roughly speaking, North America chose the first route, while Europe took the second. The results speak for themselves: one approach produced mass mobilization and a dramatic improvement in the lives of gay men and lesbians, the other produced books and pamphlets from small groups of intellectuals and changed little or nothing. Few ordinary people, it seems, could be interested in the abstract project of liberating homosexuality. The fact is that, in order to abolish social categories (such as homosexual and heterosexual), we first have to fully construct them so that there

is a potentially powerful human agency with an interest in their abolition. And unless a political theory points to practical and achievable goals which a significant number of people see as worth fighting for, it will be of no consequence.

Thanks for checking the quotes with us.

Regards,

A handwritten signature in cursive script, appearing to read 'Ken'.

Ken Popert.

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